Docket for 04-6964

(9)

No. 04-6964

Title:	Jay Shawn Johnson, Petitioner
	v.
	California
Docketed:	October 27, 2004
Lower Ct:	Court of Appeal of California, First Appellate District
Case Nos.:	(A085450)
Decision Date:	August 5, 2004
Discretionary Court Decision Date:	October 20, 2004

Questions Presented

| ~~Date~~ | ~~~~~~~Proceedings and Orders~~~~~~~

04 6964

No. 04-_____

IN THE SUPREME COURT OF THE

UNITED STATES

October term, 2004

ORIGINAL

Supreme Court, U.S.
FILED
OCT 22 2004
OFFICE OF THE CLERK

JAY SHAWN JOHNSON, Petitioner

vs.

STATE OF CALIFORNIA, Respondent

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner Jay Shawn Johnson asks leave to file the accompanying petition for writ of certiorari without prepayment of costs, and to proceed in forma pauperis. Petitioner has continuously been granted leave to so proceed. This Court granted him in forma pauperis status in his prior case at this Court, Johnson v. California, case #03-6539. He has been represented by court-appointed counsel at the trial court (by the local public defender's office) and on appeal, including at this Court (by the undersigned). Petitioner has been continuously imprisoned on this case since February, 1996. Petitioner's affidavit in support of this motion is attached hereto.

Dated: Oct. 20, 2004

STEPHEN B. BEDRICK*
Attorney at Law
1970 Broadway, Suite 1200
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No. 04 - ____

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 2004

JAY SHAWN JOHNSON, Petitioner

vs.

STATE OF CALIFORNIA, Respondent

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

I, Jay Shawn Johnson, being first duly sworn, depose and say that I am the Petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor, and that I believe I am entitled to redress.

I further swear that my responses to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true:

1. Are you presently employed? Yes. ____ No. \

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

---

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

I don't recall, it was 8 and a half years ago

ORIGINAL

04 6964

Supreme Court, U.S.
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No. 04 - ____

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 2004

JAY SHAWN JOHNSON, Petitioner

vs.

STATE OF CALIFORNIA, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes. ____ No. ___\

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

_____

3. Do you own any cash or checking or savings account (include any funds in prison accounts)? Yes. ____ No. ___\

a. If the answer is yes, state the total value of the items owned.

_____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes. ____ No. ___\

a. If the answer is yes, describe the property and state its approximate value.

_____ _____

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None

I declare under penalty of perjury that the foregoing is true and correct.

Executed on Sept 14, 2004, at Vacaville, California.

Jay Shawn Johnson

JAY SHAWN JOHNSON

QUESTION PRESENTED

Whether to establish a prima facie case under Batson v. Kentucky, 476 U.S. 79 (1986), the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias?

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No. 04 - _____

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 2004

JAY SHAWN JOHNSON, Petitioner

vs.

STATE OF CALIFORNIA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioner JAY SHAWN JOHNSON respectfully requests that a Writ of Certiorari issue to review the judgment of the California Supreme Court entered June 30, 2003.

Last term, on December 1, 2003, this Court granted certiorari in this case, Johnson v. California, #03-6539, to review this judgment, and to decide the same question presented here, namely, whether the California test for a prima facie case of racial discrimination in jury selection complies with Batson v. Kentucky, 476 U.S. 79 (1986).

The case was fully briefed, and oral argument was held on all topics. However, on May 3, 2004 the Court dismissed the case for lack of jurisdiction, due to lack of a final judgment, because some non-Batson issues had not yet been decided by the state courts. Johnson v. California, ____ U. S. ____, 124 S.Ct. 1833 (2004).

These issues have now been decided. On August 5, 2004, after remand, the California Court of Appeal decided all the remaining non-Batson issues, and affirmed Petitioner's conviction. On October 20, 2004 the California Supreme Court denied

review. The state judgment is now final, within the meaning of 28 U. S. C. §1257(a).

OPINIONS BELOW

(1) On April 5, 2001, the California Court of Appeal reversed Petitioner's conviction because the trial court erred in failing to find a prima facie case of racial discrimination in jury selection under Batson. People v. Johnson, case #A085450, formerly reported at (2001) 88 Cal.App.4th 318. (Opinion attached as Appendix A)

(2) On June 30, 2003 the California Supreme Court reversed the Court of Appeal's decision on the Batson issue and upheld the trial court ruling, denying a prima facie case. People v. Johnson (2003) 30 Cal.4th 1302 [1 Cal.Rptr.3d 1, 71 P.3d 270]. (Opinion attached as Appendix B)

(3) On December 1, 2003, this Court granted certiorari, Johnson v. California, case# #03-6539, to review the decision by the California Supreme Court, but on May 3, 2004, after oral argument, this Court dismissed the case for lack of jurisdiction, due to lack of a final judgment. Johnson v. California, ____ U. S. ____, 124 S.Ct. 1833 (2004) (Opinion attached as Appendix C)

(4) On August 5, 2004, on remand, the California Court of Appeal decided all the remaining non-Batson issues. It affirmed Petitioner's conviction. It determined that the California Supreme Court's June 30, 2003 opinion foreclosed it from revisiting the Batson issues. People v. Johnson, case #A085450, and #A106431. (Opinion attached as Appendix D)

(5) On October 20, 2004 the California Supreme Court denied review, People v. Johnson, case #S127602. (Order attached as Appendix E)

JURISDICTION

Subject matter jurisdiction arises here under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the equal protection clause of the Fourteenth Amendment to the

United States Constitution, which provides: "Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE AND OF THE FACTS

This petition presents the identical question and identical facts on which the Court granted certiorari on December 1, 2003 in Johnson v. California, case #03-6539.

As to the crime: Petitioner Jay Shawn Johnson was convicted in 1998 of second degree murder, California Penal Code §187, and assault on child, resulting in death, California Penal Code §273ab. Petitioner, an African-American (black) man, caused the death of Janika Price, the 18-month old daughter of his white girlfriend and another man. The issue at trial was whether the homicide was accidental or malicious.

As to jury selection: The prosecutor peremptorily challenged all three black jurors who had been passed for cause, leaving Petitioner, a black man, to be tried by a jury with no black persons on it, in a case with racial overtones.

The prosecutor did not question any of the three black jurors on voir dire before he struck them. He did not give reasons for his challenges. The trial judge speculated as to possible reasons for challenges to two of these three jurors, but said nothing about the third. The trial judge acknowledged that one of the challenged juror's "answers tend[ed] to favor the prosecution."

In denying a prima facie case on Petitioner's Batson motion, the trial court employed California's then-applicable "strong likelihood" standard, stating "there's not been shown a strong likelihood that the exercise of peremptory challenges were based upon a group rather than an individual basis." (Aug. RT 223, emphasis added) Nonetheless, the trial court did state that this set of challenges was "very close" to presenting a prima facie case. (Id.)

A divided panel of the state Court of Appeal concluded by a vote of 2-1 that Johnson had established a prima facie case under Batson, and reversed his conviction,

relying on several factors:(i) the prosecutor peremptorily challenged all three black potential jurors. (ii) The trial court erred when it stated that the standard for a prima facie case was a "strong likelihood" of discrimination. Instead, the correct test is the less stringent standard of an "inference" of discrimination under Batson. Because the trial court applied an incorrect legal standard, its ruling was not entitled to deference, and the Court of Appeal could review the issue de novo. (iii) There was no race-neutral reason on the record why two of the three black jurors, Clodette Turner and Sara Edwards, would not be suitable. (iv) The supposed reasons why the prosecutor challenged them were pretextual, because those same reasons applied to several white jurors whom he accepted.

The California Supreme Court, by a vote of 5-2, reversed the Court of Appeal, and affirmed the trial court's finding of no prima facie case. The majority held: (i) To establish a prima facie case under Batson, a party must demonstrate "that it is more likely than not that the other party's peremptory challenges, if unexplained, were based on impermissible group bias." People v. Johnson, 30 Cal.4th at 1306. (ii) Where a trial judge, relying on such a standard, has concluded that there was no prima facie case, affirmance on appeal is required "if the record suggests grounds on which the prosecutor might reasonably have challenged the jurors." People v. Johnson, 30 Cal.4th at 1325 (emphasis added). (iii) A defendant is barred from arguing on appeal that these "suggested" grounds were pretextual, even if those grounds equally applied to white jurors who were accepted. People v. Johnson, 30 Cal.4th at 1318-1324.

Two of the seven California Supreme Court justices dissented. They maintained that to establish a prima facie case an objector need only identify evidence which would permit an inference of discrimination. Such a prima facie case was established here, because the prosecutor perempted all three black jurors, and because, as to at least two of those jurors, there is nothing on the record showing why they would not be acceptable. People v. Johnson, 30 Cal.4th at 1333, 1340, 1341.

REASONS FOR GRANTING CERTIORARI

The reasons why the Court granted certiorari a year ago still exist, and warrant a new certiorari grant. Last term the California Attorney General's office explicitly supported Petitioner's request for certiorari in the prior case, #03-6539. The State explained why in its "Brief of Respondent in Support of Petition for Writ of Certiorari" dated October 23, 2003, at pp. 3-6:

> The nature of the prima facie case burden under Batson is an important federal question, and the California Supreme Court and the Ninth Circuit have issued squarely conflicting opinions on the extent of that burden. See Sup. Ct. R. 10(b) . . . That split poses a tremendous burden on California.
>
> Using the "raise an inference" standard mandated by *Wade* [*v. Terhune*, 202 F.3d 1190 (9th Cir. 2000)] , federal habeas courts reevaluate de novo every California criminal case with a *Batson* claim in which the state court has found no prima facie case. . . . Because the state court never found a prima facie case, the trial prosecutor never had occasion to state reasons for his peremptory challenges in the trial court. This necessitates an evidentiary hearing in the federal habeas corpus proceeding at which the trial prosecutor, if available, has to testify. . . . If reasons are given, then years later . . . the district court determines whether peremptories were exercised discriminatorily. Cf. *Fernandez* [*v. Roe*], 286 F.3d 1073 [(9th Cir. 2002)] (finding prima facie case in 2002 and remanding for evidentiary hearing concerning 1995 trial). [*] . . .
>
> The split of authority should be resolved at the earliest opportunity. Nothing can be gained from allowing more cases to be affirmed in state court under the California Supreme Court's decision in this case but then, potentially, vacated on federal habeas corpus review under *Wade*.

Nothing has changed since then.

At oral argument in the prior case on March 30, 2004, and in its opinion, the Court invited Petitioner to seek certiorari again. The opinion in the prior case (#03-6539)

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*In the instant case, the trial judge offered the prosecutor the opportunity to state reasons, but he declined.

explicitly informed Petitioner that he may seek certiorari again, once he obtains a final judgment in state court. Johnson v. California, 124 S.Ct. at 1835. That has been done.

During oral argument in the prior case (#03-6539), in the rebuttal portion, when counsel for Petitioner urged the Court to decide the issue on the merits, because he feared that, otherwise, resolution would never be reached, the following colloquy occurred:

> MR. BEDRICK [counsel for Petitioner]: . . . I'd respectfully ask the Court to reach this issue.
>
> In terms of what would happen if the States -- at the State court, I don't think I -- I could never get back to this Court or anywhere else. . . .
>
> I will then be trying to come to this Court, having gotten no opinion from the court of appeal, having gotten a postcard denial from the State supreme court and would not be able to get here. I think that will be --
>
> QUESTION: Yes, you would. You'd have a --
>
> QUESTION: We'll be waiting. (Laughter.)
>
> QUESTION: You'd have a decision from the highest Court in the State that has ruled on it, and you could -- you could come here. You would have then -- let's say you have a judgment affirming the conviction. You could come here from that.
>
> MR. BEDRICK: If that was a guaranteed invitation, Your Honor, I would accept it. (Laughter.)
>
> QUESTION: We will -- we will already have done the work. Your odds are better than most people. (Laughter.) (transcript of oral argument, pp. 52-53)

Insofar as that colloquy invited Petitioner to return to the Court to have the case decided on the merits, once the state decision became final, Petitioner gratefully accepts that invitation.

ARGUMENT

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THERE IS A DIRECT CONFLICT BETWEEN THE CALIFORNIA COURTS AND THE FEDERAL COURTS

A renewal of certiorari is warranted, because California continues to deviate from the principles established by this Court in Batson and its progeny. Unless this Court corrects the current decision, future California decisions will continue to violate Batson in several ways, and will continue to violate the equal protection rights of minority citizens to serve on juries.

(1) First, the California Supreme Court has refused to follow the directive of this Court in Batson that a prima facie case of discrimination arises whenever there is an "inference" of discrimination. Instead, the California Supreme Court erected in this case a much higher barrier before a prosecutor will be required to explain the reasons for his challenges. That court held here that an objecting party must show by a preponderance of the evidence ("more likely than not") that a challenge is racially-based before even a prima facie case of discrimination is presented, and before the prosecutor must state his reasons. People v. Johnson, 30 Cal.4th at 1306.

This test creates a much higher threshold for a prima facie case than Batson's "inference" standard. This test will result in a reduced level of scrutiny of race-based challenges to minority jurors, in violation of Batson. This test will severely weaken the 14th Amendment equal protection right of minority citizens to serve on juries.

(2) Second, California allows appellate courts, in reviewing the denial of a prima facie case, to speculate as to possible race-neutral reasons for challenging a minority juror, even if the prosecutor gave no reason, and then to affirm if there is anything in the record which might provide a rational basis for such speculation. People v. Johnson, supra, 30 Cal.4th at 1325. This raises the prima facie threshold to an almost unreachable level.

The Question Presented last year and reasserted this year acknowledges that Batson requires a prima facie case to be evaluated while the challenge is "unexplained." "Unexplained" means without a reason being given. That means both "unexplained" by the challenger, and "unexplained" by anyone else, meaning that no one else may make assumptions or guesses as to the challenger's reasons. That is because Batson only provides for consideration of the prosecutor's actual reason, and not for consideration of conjectured or merely possible reasons.

Written speculation, after the fact, on appeal -- as the California Supreme Court did here -- as to possible justifications is not proper. Under Batson, once a prima facie case has been established, "the prosecutor must articulate a neutral explanation." Batson, 476 U. S. at 98 (emphasis added). The prosecutor must do so personally by a statement in open court. This Court has emphasized the importance of demeanor evidence in resolving Batson claims. Hernandez v. New York, 500 U. S. 352, 365, 114 LEd.2d 395, 111 S.Ct. 1859 (1991). That demeanor evidence would be unavailable if a prosecutor were permitted at step two to respond after the fact with a written explanation of his actions. Thus, the state's burden may not be satisfied through written arguments by an appellate attorney, with or without personal knowledge of the reason for the peremptory challenge. A fortiori, a court cannot itself assume the prosecution's burden and hypothesize possible explanatory motivations.

(3) Third, this misuse of speculative reasons is aggravated still further. The California Supreme Court, virtually alone among all state and federal jurisdictions, refuses to examine whether these speculative reasons would also apply to white jurors who have been accepted. If so, that would constitute strong evidence that the claimed reasons for the challenge to the minority juror are pretextual. Miller-El v. Cockrell, 537 U. S. 322, 123 S.Ct. 1029, 1043-1044 (2002). However, the California courts refuse to apply even that limited degree of scrutiny to speculative reasons, even though that refusal is contrary to Miller-El.

For all these reasons, certiorari is warranted now, as it was a year ago. Further,

conflict has continued between the California courts and the federal courts on all these Batson issues. The California Supreme Court has continued to apply the preponderance of the evidence ("more likely than not") standard for finding a prima facie case of discrimination in jury selection. It has continued to allow trial and appellate courts to speculate as to a prosecutor's reasons for his challenges. People v. Cleveland (2004) 32 Cal.4th 704, 732 [86 Cal.Rptr.3d 302, ____ P.3d ____] (applying "more likely than not" test for prima facie case; allowing appellate court to speculate as to possible reasons for challenges after prosecutor declined to state any); People v. Yeoman (2003) 31 Cal.4th 93, 114 [2 Cal.Rptr.3d 186; 72 P.3d 1166] (allowing appellate court to speculate as to possible reasons for challenges after prosecutor declined to state any, but refusing to apply comparative juror analysis to determine whether those supposed reasons would be pretextual).

Similarly, the Ninth Circuit has continued to find the California standards constitutionally defective in all these particulars. In Paulino v. Castro, 371 F.2d 1083 (9th Cir. 2004) (opinion by Kozinski, J.) the Ninth Circuit granted habeas relief because the prima facie Batson test used by the California courts was constitutionally defective. The Paulino court found that California's prima facie test was wrong in two particulars. (i) A prima facie case of a Batson violation should be found when there is an "inference" of discrimination. Thus, California's "more likely than not" test is defective, because that threshold is unduly elevated. (ii) Paulino also held that the trial court may only rely upon the prosecutor's stated reasons, and not upon hypothetical or possible reasons. Paulino v. Castro, supra, 371 F.3d at 1089-1092.

Because California courts continue to conflict with the federal courts on all these principles, a renewal of the grant of certiorari is warranted.

II.

CERTIORARI SHOULD BE GRANTED BECAUSE THE CALIFORNIA DECISION IS CONTRARY TO DECISIONS OF THIS COURT

Because this case was fully briefed and orally argued only months ago, Petitioner only outlines, but does not repeat in detail, his arguments from the prior briefing in case #03-6539 as to why the California standards do not comply with Batson.

(1) The California "more likely than not" prima facie test violates the directive in Purkett v. Elem, 514 U.S. 765, 131 L.Ed.2d 834 (1995) that the three steps of Batson analysis must be evaluated separately and must not be conflated. As the Court held in Purkett v. Elem:

> [O]nce the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination. *Hernandez v. New York*, 500 U.S. 352, 358-359 (1991) (plurality opinion) id., at 375 (O'Connor, J., concurring in judgment); *Batson, supra,* at 96-98.

This test requires separate analysis at each of the three steps. In Purkett v. Elem the Court reversed because the circuit court improperly conflated steps two and three. It conflated those steps when it required that the "justification tendered at the second step be not just neutral but also at least minimally persuasive, i.e. 'plausible.'" Id., 514 U. S. at 768. That conflation was defective, because it improperly required the prosecutor to show at step two not only that his reason was race-neutral (the step two requirement) but also that it was plausible and persuasive (the step three issue).

The California test in Johnson is similarly and incorrectly conflated when it requires the objector to satisfy the same burden of proof at the prima facie stage (step one), before he has heard the challenger's reasons, as he must meet at the merits stage (step three), after he has heard the challenger's reasons -- namely, proof that discrimination is more likely than not.

Instead, the prima facie test should be stated as follows: To establish a prima facie case, the objector should identify sufficient evidence in the record to allow a finding that the other party's peremptory challenges, if unexplained, were based on impermissible group bias. This type of inference is referred to as a permissive inference. See, e.g., Ulster County Court v. Allen (1979) 442 U. S. 140, 156. That is the test which is utilized by the federal Courts of Appeals. That is the test which was stated by the dissent at the California Supreme Court, namely, that the objector should adduce evidence sufficient to permit an inference of discrimination. People v. Johnson, supra, 30 Cal.4th at 1334-1339 (Kennard, J. dissenting). Such standard is consistent with the rule in virtually every jurisdiction in the nation except California. This standard should be applied here.

(2) The California Supreme Court's "more likely than not" test presents too high a threshold for a prima facie Batson case.

The purpose of a prima facie finding on a Batson challenge is to allow the objector to obtain, and the trial court to hear, the challenger's reason. Because this is akin to a discovery motion, it would violate the entire Batson process to require an objector to prove discrimination by a preponderance of the evidence ("more likely than not") at the prima facie stage, before obtaining discovery, namely, the prosecutor's claimed reasons. Such a test would require the objector to try to prove at the prima facie stage that discrimination was more likely than not, before obtaining the evidence he needs to prove that discrimination was more likely than not. Such a cart-before-the-horse procedure would violate due process, just as it would violate due process to require a civil plaintiff to prove his case on the merits in order to get discovery. See, e.g., Swierkiewicz v. Sorema, 534 U. S. 506, 511-512, 152 L.Ed.2d 1, 122 S.Ct. 992 (2002).

(3) The California courts distort the entire Batson process when, at the prima facie stage, they search the record for possible race-neutral reasons why someone might have challenged a juror, without any evidence that that the prosecutor actually employed such a reason.

When the "Question Presented" uses the term "if unexplained," that means (a)

before any party states an explanation for a challenge, and (b) before anyone else speculates as to a hypothetical or theoretical explanation.

Speculation at the prima facie stage as to possible reasons for challenges wrongly conflates Batson's step one analysis (prima facie case) with step three (evaluation of the prosecutor's actual explanations and decision on the merits). This improper conflation, like that discussed supra, violates the rule of Purkett v. Elem. It disobeys the rule that there must be separate analysis at each of the three Batson steps. At step one the court is to decide whether the evidence relied upon by the objector is sufficient "if unexplained" to create a prima facie case. At step one the court is not to consider possible explanations offered by the prosecutor, hypothesized by appellate counsel, or thought up by the court itself. "Unexplained" means just that -- unexplained.

Such speculation as to possible explanations is wrong in another way. Batson only provides for consideration of the prosecutor's actual reason, and not for consideration of conjectured or theoretically possible reasons. When there is no proof that the conjectured reasons reflect the prosecutor's real motivation, they should not be relied upon, because they "cannot be mistaken for the actual reasons for a [peremptory] challenge." Mahaffey v. Page, 162 F.3d 481, 483-484, n. 1 (7th Cir. 1993); Riley v. Taylor, 277 F.3d 261, 282 (3d Cir. 1999) (en banc) ("Apparent or potential reasons do not shed any light on the prosecutor's intent or state of mind when making the peremptory challenge"); Bui v. Haley, 321 F.3d 1304, 1313-1314 (11th Cir. 2003) (*post hoc* suggestion of reasons by second lawyer is not adequate substitute for actual reasons used by first lawyer).

(4) The California test obstructs the battle to eliminate racial discrimination in jury selection.

Until a prima facie case is established, the objector does not have access to the information needed to show whether a challenge is discriminatory, namely, the claimed reason for a challenge. If the barrier for establishing a prima facie case is set too high -- as the California courts did here, when they refused to make inquiry even after the

prosecutor perempted all three black jurors -- the necessary evidence for evaluating possible discrimination will be absent, and judicial scrutiny of possible discrimination will be unduly reduced.

The purpose of a prima facie case under Batson "'is to help courts and parties answer, not unnecessarily evade, the ultimate question of discrimination, *vel non*.'" Jones v. Plaster, 57 F.3d 417, 421 (4th Cir. 1995), quoting from United States Postal Service Bd. of Governors v. Aikens, 460 U. S. 711, 714, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983). That purpose will only be satisfied by a sufficiently relaxed prima facie standard which encourages, not discourages, learning the reasons for challenges to minority jurors.

WHEREFORE, for all these reasons, Petitioner prays that the Court grant certiorari again, so that the Court may complete the work on this case which it started, but did not finish, last term.[2]

Dated: Oct. 21, 2004

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Stephen B. Bedrick

[2]Petitioner wishes to note that another, unrelated Johnson v. California case, Garrison Johnson v. California, case 03-636, is already on the docket for the 2004 term. (Garrison Johnson is a civil rights suit challenging racial discrimination in prisoner housing.)

APPENDIX A

COPY

SEE DISSENTING OPINION
CERTIFIED FOR PARTIAL PUBLICATION*
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

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Court of Appeal - First App. Dist.
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RON D. BARROW, CLERK
By _____ DEPUTY

THE PEOPLE,
Plaintiff and Respondent,
v.
JAY SHAWN JOHNSON,
Defendant and Appellant.

A085450

(Contra Costa County
Super. Ct. No. 96-0691-4)

I.

Jay Shawn Johnson was convicted of second degree murder and assault resulting in the death of a child under the age of eight (Pen. Code, §§ 187, 273ab) upon retrial after a partial reversal on his first appeal. The murder victim was Janika Price, the 19-month-old daughter of Jennifer Shelton with whom appellant was romantically involved. In the first appeal, we affirmed appellant's conviction of corporal injury on a cohabitant, Jennifer Shelton (Pen. Code, § 273.5), and reversed his convictions of second degree murder and assault on a child leading to death for error in jury instructions on the cause of death. Appellant was retried in December 1998, and was sentenced to 15 years to life imprisonment on the murder conviction to run concurrently with the three-year term for corporal injury on a cohabitant.

Appellant raises a number of evidentiary issues, as well as a claim that the trial court erred when it failed to find a prima facie case of a *Wheeler* (*People v. Wheeler*

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part II.

(1978) 22 Cal.3d 258) violation. We conclude a prima facie case of group bias was established and that the judgment must therefore be reversed. In the unpublished portion of this opinion we set forth factual details unrelated to the *Wheeler* issue that bear upon evidentiary questions that are addressed to provide guidance to the trial court upon retrial.

DISCUSSION

I.

Appellant, who is African-American, contends the prosecutor improperly used peremptory challenges to excuse three African-American prospective jurors because of their race, which completely eliminated African-Americans from the jury. Appellant made two motions for a mistrial under *People v. Wheeler, supra*, 22 Cal.3d 258 for racial discrimination in jury selection. Both were denied for failure to present a prima facie case.

The first *Wheeler* motion was directed to the prosecution's challenges to "three African-American women," namely Clodette T., Sara E., and Bernice L.[1] Defense counsel argued there were no valid race-neutral justifications for these challenges. Finding no prima facie case had been established, the court denied the motion, adding: "[h]owever, I would indicate that we are very close, Mr. Brown [prosecutor]."

The second *Wheeler* motion was made the next day, in response to the prosecutor's peremptory challenge to another African-American woman, Ruby L. Defense counsel maintained that the prosecutor's peremptory challenge of every African-American seated reflected a systematic attempt to exclude African-Americans from the jury panel. In denying the motion, the court noted that it found Ms. L.'s answers sufficient to justify a peremptory challenge in that her answers to the questionnaire raised concerns about her ability to understand the proceedings. As to Sara E., the court noted that she had omitted in her questionnaire the information about a parent's arrest for robbery some 30 years earlier. The court also recalled that Ms. E. had indicated concern

1 Bernice L. was later dropped from the motion after it was ultimately determined that her racial background was "Indian."

about whether she could be fair, even though her "answers tend to lean in favor of the prosecution." The court made no comment about the challenge of Clodette T. In denying the motion the court stated: "Even with the addition of Ms. L., the Court will not find a prima facie case. The People are [not] exercising challenges based on group bias, rather than individual bias." The court then offered the prosecutor the opportunity to make a further record, which he declined.

"The use of peremptory challenges to eliminate prospective jurors because of their race is prohibited by the federal Constitution (*Powers v. Ohio* (1991) 499 U.S. 400, 409; *Batson v. Kentucky* (1986) 476 U.S. 79, 89) and by the California Constitution (*People v. Wheeler* (1978) 22 Cal.3d 258, 276-277)." (*People v. Mayfield* (1997) 14 Cal.4th 668, 722-723.)

A.

At the time the parties briefed this case, there was a dispute about whether *Wheeler* required a greater evidentiary showing for a prima facie case than was required under *Batson*.[2] *Wheeler* states: "If a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he must raise the point in timely fashion and make a prima facie case of such discrimination to the satisfaction of the court. First, . . . he should make as complete a record of the circumstances as is feasible. Second, he must establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule. Third, from all the circumstances of the case he must show a *strong likelihood* that such persons are being challenged because of their group association rather than because of any specific bias." (*Wheeler*, at p. 280, italics added.) In the next paragraph of the *Wheeler* opinion the court describes the types of evidence a party may use to show his opponent is challenging persons from the venire because of their group association. The opinion then goes on to state that "[u]pon presentation of this and similar evidence . . . the court must determine whether a *reasonable inference* arises that peremptory challenges are being used on the ground of group bias alone. (*Id.* at p. 281, italics added.) As will be seen, the separate references to "strong likelihood" and "reasonable inference" has created some confusion as to which of the two standards applies, as most courts that have addressed the question have concluded that a "strong likelihood" requires a stronger showing than a mere inference.

There is, however, no such confusion as to which standard applies under *Batson*, the federal counterpart to *Wheeler*. To establish a prima face case of discrimination under the United States Constitution, *Batson* states that a defendant must "*raise an inference* that the prosecutor used that practice [peremptory challenges] to exclude the veniremen from the petit jury on account of their race." (*Batson v. Kentucky, supra*, 476 U.S. at p. 96, italics added.) The difference in language between *Wheeler* ("strong likelihood") and *Batson* ("raise an inference") led to a dispute about whether *Wheeler* established a stricter test than *Batson*. In *People v. Fuller* (1982) 136 Cal.App.3d 403, 423, which was decided prior to *Batson*, the court acknowledged that the *Wheeler* opinion uses both phrases, but concluded "that a fair reading of *Wheeler* requires only

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[2] Appellant cited only *Wheeler* in his motions for a mistrial and did not mention the federal Constitution or the *Batson* case. The People maintain that appellant's failure to articulate the federal basis for his objection to the peremptory challenges waives the claim, citing *People v. McPeters* (1992) 2 Cal.4th 1148, 1174. In *McPeters*, the court found the defendant had waived the asserted Sixth Amendment ground by failing to raise it in connection with his *Wheeler* motion, but it nevertheless rejected the claim on its merits. (*McPeters, supra*, 2 Cal.4th at p. 1174.) Appellant denies he waived his federal rights, citing *Ford v. Georgia* (1991) 498 U.S. 411, 418-419, which held a defendant's objection to racial discrimination in jury selection was sufficient to invoke his federal right to be free of racial discrimination in jury selection under *Batson*, even if he did not cite *Batson* or describe with particularity the exact federal provision violated. (See also *Turner v. Marshall* (9th Cir. 1995) 63 F.3d 807, 811, fn. 1 [challenge framed in terms of *Wheeler* construed to allege *Batson*]; overruled on other grounds by *Tolbert v. Page* (9th Cir. 1999) 182 F.3d 677.) The debate as to whether appellant made and preserved a *Batson* claim makes sense only if, as the parties seem to believe, it is more difficult to establish a prima facie case under *Wheeler* than under *Batson*. As later discussed, our Supreme Court has recently made it clear that *Wheeler* imposes the same standard as *Batson*. The question whether appellant waived a *Batson* claim is therefore now moot.

that the court find a reasonable inference of group bias . . . ." (*Id.* at p. 423.) The *Fuller* court was "unwilling to believe that our high court intended to create different options for trial judges within one page of each other in so carefully crafted an opinion as the *Wheeler* opinion." (*Id.* fn. 25.)

The *Fuller* view of *Wheeler* was repudiated in *People v. Bernard* (1994) 27 Cal.App.4th 458 which rejected the view "that a fair reading of *Wheeler* requires only that the court find a reasonable inference of group bias." (*People v. Fuller, supra,* 136 Cal.App.3d at p. 423) According to the *Bernard* court, "a reduction of the prima facie standard to a 'reasonable inference' test would reduce the trial court's discretion and judgment at a time when it is uniquely situated to observe the nature and extent of voir dire as well as the attitude and awareness of the challenged prospective juror." (27 Cal.App.4th at p. 465) The conclusion of the *Bernard* court that a "strong likelihood" requires a stronger showing than a "reasonable inference," and that such a stronger showing must be made to establish a prima facie case of violation of the *Wheeler* rule, has been followed by other appellate courts in this state. (See, e.g., *People v. Buckley* (1997) 53 Cal.App.4th 658, 665-666; *People v. Walker* (1998) 64 Cal.App.4th 1062, 1067.)

Recently, in *Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190, the Ninth Circuit observed that since the decision in *Bernard*, "the California state courts have applied a lower standard of scrutiny to peremptory strikes than the federal Constitution permits. [¶] The California Supreme Court now routinely insists, despite *Batson*, that a defendant must show 'a strong likelihood' of racial bias. Its consistent practice is to cite *Batson* and *Wheeler* together as controlling law but to quote the 'strong likelihood' language from *Wheeler* rather than the 'raise an inference' language from *Batson*. [Citations.] *Batson* is, of course, the law of the land. California law may give greater protection to criminal defendants than is required by the federal Constitution, but it cannot give less. Yet this is precisely what the California courts now do when they follow the *Wheeler* 'strong likelihood' test in determining whether a prima facie case has been established. [¶] In our view, the *Wheeler* 'strong likelihood' test for a successful prima facie showing of

bias is impermissibly stringent in comparison to the more generous *Batson* 'inference' test." (*Id.* at pp. 1196-1197) Accordingly, the *Wade v. Terhune* court concluded that "[w]here the California courts follow the 'strong likelihood' language of *Wheeler* without any indication that they are actually applying a 'reasonable inference' test consonant with *Batson,* they apply an incorrect legal standard." (*Id.* at p. 1197.)

Wade v. Terhune also opines "that the *Wheeler* court itself understood 'a strong likelihood' to mean a 'reasonable inference.' While the *Wheeler* Court, on page 280 of its opinion, required a defendant to 'show a strong likelihood' that the prosecutor excluded venire members from the jury on the basis of race, the *Wheeler* Court phrased its central holding somewhat differently on the very next page: 'Upon presentation of this and similar evidence—in the absence, of course, of the jury—the court must determine whether a *reasonable inference* arises that peremptory challenges are being used on the ground of group bias alone.' *Id.* at 281 . . . (emphasis added). It is this language regarding a 'reasonable inference' that the Supreme Court of the United States borrowed when it formulated the *Batson* test." (*Id.* at p. 1196)

In *People v. Box* (2000) 23 Cal.4th 1153, which issued six months after *Wade v. Terhune*, our high court included a short footnote agreeing with the Ninth Circuit that "in California, a 'strong likelihood' means a 'reasonable inference'" (*id.* at p. 1188, fn. 7) and disapproving *People v. Bernard, supra,* 27 Cal.App.4th 458.[3] The Attorney General dismisses this statement as relatively insignificant. All it means, he says, is that the Supreme Court and intermediate appellate courts were always adhering to the *Batson* standard. In other words, according to the Attorney General, for *Wheeler* purposes,

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3 Prior to *Box*, our Supreme Court made no effort to clarify the ambiguity in *Wheeler*. Nor has it yet done so since *Box*. In *People v. Ayala* (2000) 24 Cal.4th 243, Justice Mosk, writing for the majority, simply states in passing that a party claiming peremptory challenges are being used to strike jurors on the ground of group bias must, among other things, "show a strong likelihood [or reasonable inference] that such persons are being challenged because of their group association . . . ." (*Id.* at p. 260, brackets in original, quoting *People v. Box, supra*, at pp. 1187-1188)

"strong likelihood" and "reasonable inference" have always meant the same thing; because the test is the same it is immaterial which phrase is used. As we shall discuss in a moment, this view, which we attribute neither to the Ninth Circuit nor our Supreme Court, conflicts with common understanding and the different meanings historically attributed by our legal system to the words at issue, would cause enormous confusion in the trial courts of this state and exacerbate the doubts that have already been raised as to the compatibility of *Wheeler* and *Batson*. Moreover, the notion that our Supreme Court not only thinks but has *always thought* that a "strong likelihood" is synonymous with a "reasonable inference" for purposes of the *Wheeler* rule, and that the lower courts of this state knew or should have known of this, was persuasively rebutted by the Ninth Circuit in *Wade v. Terhune, supra*, 202 F.3d at pp. 1196-1197.

Though not cited in *Wade v. Terhune, supra*, *People v. Sanders* (1990) 51 Cal.3d 471 demonstrates the California Supreme Court's post-*Wheeler* and pre-*Box* belief that the "strong likelihood" requirement imposes a more stringent burden that the "reasonable inference" requirement. In *Sanders*, all but four Spanish surnamed members of the venire were excused for cause either by the defense or the prosecution. When the remaining four were peremptorily challenged by the prosecution, the defendant asserted a *Wheeler* objection. The trial court denied the motion, finding the defendant had failed to demonstrate a prima facie case that the prosecutor was relying on group rather than specific bias. The Supreme Court affirmed. Acknowledging that "the removal of all members of a certain group may give rise to an inference of impropriety" under *Wheeler* (*id.* at p. 500), the Supreme Court emphasized the deference owed the trial court and primarily on that basis concluded that the "defendant failed to demonstrate a strong likelihood based on 'all the circumstances of the case' that the prosecutor's exercise of his peremptory challenges were based on group bias." (*Id.* at p. 501) After *Sanders*, most Supreme Court opinions applying the *Wheeler* rule omit any reference to the "reasonable inference" standard and focus *only* on the need to show a "strong likelihood" of group bias. (See, e.g., *People v. Welch* (1999) 20 Cal.4th 701, 745; *People v. Williams* (1997) 16 Cal.4th 635, 663-664; *People v. Mayfield* (1997) 14 Cal.4th 668, 723; *People*

v. Arias (1996) 13 Cal.4th 92, 134-135; *People v. Davenport* (1995) 11 Cal.4th 1171, 1199-1200; *People v. Turner* (1994) 8 Cal.4th 137, 164-165; *People v. Garceau* (1993) 6 Cal.4th 140, 170-171.) Indeed, the court has even italicized "strong likelihood" to emphasize the stringency of that requirement. (*People v. Howard* (1992) 1 Cal.4th 1132, 1154.)

In light of this, as the Ninth Circuit correctly observed, California courts confidently relied on the now disapproved language in *People v. Bernard, supra*, 27 Cal.App.4th at pp. 464-466, supporting application of the more demanding "strong likelihood" standard. In the present case, for example, in finding that appellant did not establish a prima facie case of group bias, the trial court stated as follows: "there's not been shown a strong likelihood that the exercise of the peremptory challenges were based upon a group rather than an individual basis. The Court has to start from the position of a premise that the exercises of the peremptory challenges were based on constitutional grounds." This language tracks the disapproved language in *Bernard* that the "presumption a party exercising a peremptory challenge is doing so on a constitutionally firm ground. . . . should be capable of being rebutted only by *a strong showing*, not a *mere inference*." (*Id.* at p. 465, italics added.) As this formulation of the initial showing of discrimination required by *Wheeler* has been rejected, we do not believe we can employ it.

The question, then, is the meaning of the footnoted statement in *Box* that "'in California, a 'strong likelihood' means a 'reasonable inference.'" (23 Cal.4th at p. 1188, fn. 7.) We do not believe it means that California courts have always treated the two phrases as meaning the same thing, which would be as novel a proposition as the idea that "clear and convincing evidence" has always meant a "preponderance of the evidence."

Though an "inference" may be defined as "an implication" (Oxford English Dictionary (2d ed.)), the word is ordinarily used in the law to refer to "[a] conclusion reached by considering other facts and deducing a logical consequence from them," or "[t]he process by which such a conclusion is reached; [i.e.,] the process of thought by

which one moves from evidence to proof." (Black's Law Dictionary (7th ed.) An inference may be reasonably deducible from evidence even if it conflicts with another inference that may also be deducible from the same evidence. (See, e.g., *Grainger v. Antoyan* (1957) 48 Cal.2d 805, 807 ["When two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court."]; Code Civ. Proc., § 437c, subd. (c) ["summary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence"].) As Witkin points out, "the party's proof need not wholly exclude all unfavorable inferences; i.e., the party is not required to show that, under the circumstances, the inference in his or her favor is the only one that can reasonably be drawn. [Citations.]" (Witkin, Cal. Evidence (4th ed.), Presentation at Trial § 139, p. 198.)

However, while the same evidence, including circumstantial evidence, can give rise to conflicting inferences that are equally reasonable, the same evidence cannot simultaneously support "strong likelihoods" pointing in different directions. Thus, while courts in this State have disagreed about whether the initial showing of discrimination that constitutes a prima facie case under *Wheeler* is a "strong likelihood" or a "reasonable inference" (as, for example, the disagreement of *People v. Bernard, supra*, 27 Cal.App.4th at pp. 465-466, with the view expressed in *People v. Fuller, supra*, 136 Cal.App.3d at p. 423), the dispute was predicated upon the shared belief that the latter standard imposes a lesser burden than the former. Indeed, as already noted, the belief that a "strong likelihood" of group bias requires greater evidence than a "reasonable inference" of such bias was expressed by the Supreme Court more than a decade ago. (*People v. Sanders, supra*, 51 Cal.3d at p. 500-501.)

The statement in *Box* that "a 'strong likelihood' means a 'reasonable inference'" cannot be construed to mean that the phrases are synonymous (let alone that they were *always* thought to be synonymous), as that would reject longstanding judicial understandings, and require explanation. The different meaning of the statement is revealed, we think, by its obvious purpose, which was to reconcile *Wheeler* and *Batson*

after its incompatible application of *Wheeler* was called to our Supreme Court's attention by the Ninth Circuit in *Wade v. Terhune, supra*. As the Ninth Circuit stated, "[t]he United States Supreme Court has explained that the *Batson* framework was intended significantly to reduce the quantum of proof previously required of a defendant who wished to raise a claim of racial bias in the jury selection procedure. See *Georgia v. McCollum*, 505 U.S. 42, 47 . . . ." (*Wade v. Terhune, supra*, 202 F.3d at p. 1197) *Wheeler* is not consistent with the *Batson* framework unless the quantum of proof required by *Wheeler* to establish a prima facie case of group bias is no higher than that required under *Batson*. The statement in *Box* that "a 'strong likelihood' means a 'reasonable inference'" therefore must be taken to mean that, *for purposes of determining whether a party has established a prima facie case of group bias*, the words "strong likelihood," *as used in Wheeler and case law relating to the Wheeler rule*, shall henceforth be deemed to mean a "reasonable inference" (which is the opposite of saying that a "reasonable inference" shall be deemed to mean a "strong likelihood"). This was the view of *Wheeler* adopted in *People v. Fuller, supra*, and rejected in *People v. Bernard, supra*. By disapproving *Bernard*, the Supreme Court has in effect clarified its agreement with *Fuller* that a "reasonable inference" of group bias suffices to establish a prima facie case.

We note, finally, that the Ninth Circuit has indicated its unwillingness to defer to the Attorney General's different interpretation of *People v. Box, supra*, as clarifying that the "strong likelihood" and "reasonable inference" standards are now and have always been the same , and that use of the "strong likelihood" standard is therefore constitutionally permissible. In *Cooperwood v. Cambra* (9th Cir. Feb. 20, 2001) ___ F.3d ___, 01 C.D.O.S. 2723, the Ninth Circuit recently declared that "regardless of the California Supreme Court's 'clarification' [in *Box*] of the language used in *Wheeler*, we will continue to apply *Wade's* de novo review requirement whenever state courts use the 'strong likelihood' standard, as these courts are applying a lower standard of scrutiny to peremptory strikes than the federal Constitution permits." (*Id.* at p. 2724, citing *Wade v. Terhune, supra*, 202 F.3d at p. 1192.)

B.

In determining whether appellant established a reasonable inference of group bias, we do not limit our review solely to counsel's presentation at the time of the motion. This is because "other circumstances" readily apparent to the trial court might support the finding of a prima facie case even though not cited by defense counsel. (See *People v. Howard, supra,* 1 Cal.4th at p. 1155.) "[T]he trial court [should not] blind itself to everything except defense counsel's presentation." (*Ibid.*) Indeed, *Wheeler* emphasized that such rulings require trial judges to consider "all the circumstances of the case" (*Wheeler, supra*, 22 Cal.3d at p. 280) and called upon judges to exercise their powers of observation, their understanding of trial techniques and their broad judicial experience. (*Howard, supra*, 1 Cal.4th at p. 1155.)

It is for these reasons that the reviewing court is directed to consider "the entire record of voir dire" when a trial court denies a *Wheeler* motion without finding a prima facie case of group bias. "As with other findings of fact, we examine the record for evidence to support the trial court's ruling." (*Howard, supra*, 1 Cal.4th at p. 1155.) Because *Wheeler* motions call upon trial judges' personal observations, we view their rulings with considerable deference on appeal. If the record suggests grounds upon which the prosecutor might reasonably have challenged the jurors in question, we affirm. (*Ibid.*; *People v. Box, supra*, 23 Cal.4th at p. 1188.) The ruling is thus reviewed for substantial evidence. (See *People v. Alvarez* (1996) 14 Cal.4th 155, 196.)

As will be seen, the prima facie case asserted in this case rests in some measure on a comparison of the written and oral voir dire testimony of the African-Americans excused by the prosecution with that of other prospective jurors who were not excused, which appellant claims are materially indistinguishable. This requires us to consider whether and, if so, to what extent such comparisons may be used to show a prima facie case of group bias. Unfortunately, this is another area in which the application of *Wheeler* by California courts has differed somewhat from federal judicial application of *Batson*.

Relying on its earlier opinion in *People v. Johnson* (1989) 47 Cal.3d 1194, 1220-1221, which dealt with the review of reasons proffered by the prosecutor after a prima facie case had been found, the California Supreme Court has recently reiterated its rejection of "a procedure that places an 'undue emphasis on comparisons of the stated reasons for the challenged excusals with similar characteristics of nonmembers of the group who were not challenged by the prosecutor,' noting that such a comparison is one-sided and that it is not realistic to expect a trial judge to make such detailed comparisons midtrial." (*People v. Box, supra*, 23 Cal.4th at p. 1190.)

Federal courts have not been as reluctant as our Supreme Court to employ comparative analyses of voir dire testimony in order to determine whether the use of a peremptory challenge reflects racial or other forms of group bias and routinely do so. (See, e.g., *Caldwell v. Maloney* (1st Cir 1998) 159 F.3d 639, 651 [reasons given for challenge, though plausible, may raise serious question of pretext where explanation is equally applicable to juror of different race who was not stricken]; *Devose v. Norris* (8th Cir 1995) 53 F.3d 201, 203-205 [finding state's reason for excusing black jurors pretextual when several white jurors who were not struck gave similar answers].) This is particularly true in the Ninth Circuit. As a panel of that court recently observed, "[a] prosecutor's motives may be revealed as pretextual where a given exception is equally applicable to a juror of a different race who was not stricken by the exercise of a peremptory challenge. See *Caldwell v. Maloney*, 159 F.3d 639, 651 (1st Cir. 1998). 'A comparative analysis of jurors struck and those remaining is a well-established tool for exploring the possibility that facially race-neutral reasons are a pretext for discrimination.' *Turner v. Marshall*, 121 F.3d 1248, 1251 (9th Cir. 1997). Peremptory challenges cannot be lawfully exercised against potential jurors of one race unless potential jurors of another race with comparable characteristics are also challenged. See *id.*" (*McClain v. Prunty* (9th Cir 2000) 217 F.3d 1209, 1220-1221; accord, *U. S. v. Chinchilla* (9th Cir. 1989) 874 F.2d 695.)

The difference between our Supreme Court and the Ninth Circuit is not, however, as great as it first appears. For one thing, our Supreme Court has not precluded

comparative analyses by reviewing courts but has simply declared that they should not place an "*undue emphasis*" on such an analysis (*People v. Box, supra*, 23 Cal.4th at p. 1190; *People v. Turner, supra*, 8 Cal.4th at p. 169; *People v. Johnson, supra*, 47 Cal.4th at p. 1220.) Indeed, the Supreme Court has itself occasionally engaged in such analyses. For example, in *People v. Crittenden* (1994) 9 Cal.4th 83, in considering a challenge to a trial court finding that no prima facie case had been shown, the court entertained the defendant's claim that many jurors had expressed similar concerns about the death penalty as prospective African-American jurors who were excused. Instead of refusing to consider such a comparison, the *Crittenden* court rejected the appellant's argument on its own terms, "because all except one of these prospective jurors were excused (almost all by the prosecutor), and the prosecutor's failure to excuse the remaining juror must be viewed in light of the circumstance that the juror was called later in the proceedings, when the prosecutor's remaining peremptory challenges were few." (*Id.* at p. 119.) Also, in *People v. Jones* (1998) 17 Cal.4th 279, 295, the court addressed the defendant's comparative analysis claim that other prospective jurors who were not Black had expressed doubts about the death penalty but were impaneled anyway. It rejected the claim on its merits, finding sufficient evidence in the record to support the trial court's refusal to find a prima facie case.

It is also important to emphasize that the cases in which the Supreme Court cautioned against the placing of undue emphasis on the appellate use of comparison analysis (*People v. Box, supra*, 23 Cal.4th 1153; *People v. Turner, supra*, 8 Cal.4th 137; *People v. Montiel* (1993) 5 Cal.4th 877; *People v. Johnson, supra*, 47 Cal.3d 1194) were ones in which the trial court called for, received and accepted a race-neutral explanation from the attorney whose challenges were questioned. The important question in those cases was not whether a prima facie case of group bias had been established, but whether counsel's explanation was credible. The Supreme Court admonished against the excessive appellate use of comparison analysis in those cases because it related to the ultimate determination of bias and could not be squared with the deference that had to be accorded a trial court determination of the credibility of a proffered explanation. For

example, in *People v. Montiel, supra*, the prosecutor analyzed the views of challenged and unchallenged members of the venire and the trial judge made a "sincere and reasoned effort" to evaluate the nondiscriminatory justifications he offered. "In such circumstances," the Supreme Court stated, "an appellate court will not *reassess* good faith by conducting its own comparative juror analysis." (5 Cal.4th at p. 909, italics added.) A very different situation is presented, however, where, as in the matter before us, the trial judge neither received from counsel nor itself provided any racially neutral explanation but nonetheless refused to find a prima facie case of group bias. The issue here is neither the credibility of a racially neutral explanation nor the ultimate question of bias, but merely the *appearance* of such bias as would *call* for an explanation. Where reasons for a questioned challenge are not required by the trial court or offered by counsel, a reviewing court will often be unable to reasonably determine whether the *Wheeler* rule has been violated without some examination and comparison of the voir dire testimony of excluded and nonexcluded jurors. Barring *any* appellate use of such comparisons in those cases would materially compromise the ability of reviewing courts to intelligently evaluate the denial of *Wheeler/Batson* claims. In light of the importance of appellate review to a correct criminal adjudication (*Griffin v. Illinois* (1956) 351 U.S. 12, 18), inadequate state appellate review might undermine the presumption of the correctness of state court rulings indulged by federal courts in habeas corpus proceedings (28 U.S.C. § 2254(d)), and leave to the federal courts the enforcement of an important right arising not just under the United States Constitution but independently under our own Constitution. (See, *Burks v. Borg* (9th Cir. 1994) 27 F.3d 1424, 1428.)

We do not think our Supreme Court contemplates any abdication of state judicial responsibilities. *Wheeler* implicitly acknowledges that the exclusion of jurors on the basis of race "condones violations of the United States Constitution [and our own Constitution] within the very institution entrusted with its enforcement, and so invites cynicism respecting the jury's neutrality and its obligation to adhere to the law." (*Powers v. Ohio* (1991) 499 U.S. 400, 412.) In the light of this danger, judges must be vigilant and assertive. As stated in *Wheeler*, "the courts cannot be pacifists" in the "war" between

racial discrimination in jury selection and our basic concepts of a democratic society. (*People v. Wheeler, supra*, 22 Cal.3d at p. 280.) The *Wheeler* rule is meaningless unless a trial court finding that a prima facie case of racial or group bias has not been established is subject to meaningful review. Where such a finding is unexplained by the trial court or by counsel, a reviewing court must be able to examine all the relevant evidence, including a comparison of the voir dire testimony of excluded and nonexcluded jurors.

It is also necessary to remember that *People v. Howard, supra*, 1 Cal.4th 1132, 1155 states that judicial review of a defendant's attempt to establish a prima facie case is not limited to a review solely of counsel's presentation at the time of the motion in order to ensure that even if the defendant's showing is inadequate, there are no "other circumstances" which might support a finding of a prima facie case. Courts of Appeal have lamented that by relieving trial courts of the need to provide a rationale for a no prima facie case finding, and requiring appellate courts to examine the entire record in search of a justification, the Supreme Court has in effect compelled reviewing courts "to move into the realm of speculation concerning why a party 'may' have a reason to challenge a juror other than his or her membership in a cognizable group." (*People v. Trevino* (1997) 55 Cal.App.4th 396, 409.) As one court has stated, "where a defendant fails to make a prima facie case and, because of that, the prosecutor has not been called upon to state race-neutral reasons for exercising a peremptory, the appellate court, under the position taken by the California Supreme Court in *Howard*, is placed in the almost untenable position of culling from the record possible race-neutral reasons for excusal." (*People v. Walker, supra*, 64 Cal.App.4th 1062, 1069; accord, *People v. Buckley, supra*, 53 Cal.App.4th 658, 667 ["It is clearly uncomfortable for an appellate court to postulate hypothetical reasons a prosecutor might have challenged each juror."].) Needless to say, the problem created by *Howard* would be immeasurably exacerbated, and it would be irrational and unfair, if a comparison of the voir dire testimony of challenged and unchallenged members of the venire were excluded from the "other circumstances" reviewing courts have been required by the Supreme Court to examine.

For the foregoing reasons, we conclude that in a case such as this a reviewing court may examine and compare the voir dire testimony of those members of the venire excluded from the jury and those who were not, provided such evidence is not "one-sided," "highly speculative" or "unduly emphasized" (*People v. Johnson, supra*, 47 Cal.3d at pp. 1220-1221), but solid and persuasive.

With these thoughts in mind, we proceed to consider the voir dire testimony and other evidence appellant relies upon in arguing that the trial court erred in finding he did not establish a prima facie case of group bias. We preface our analysis, however, by noting that the prosecution's use of peremptory challenges removed all African-Americans from the jury, and in *People v. Sanders, supra*, 51 Cal.3d at p. 500, the Supreme Court indicated that this *alone* "may give rise to an inference of impropriety." (Accord, *U. S. v. Chinchilla, supra*, 874 F.2d 695, 698, fn. 4; *U. S. v. Thompson* (9th Cir. 1987) 827 F.2d 1254, 1256-1257; *U. S. v. Alcantar* (9th Cir. 1987) 832 F.2d 1175, 1177.)

Clodette T.

Clodette T.'s juror questionnaire revealed she was 42 years old, had been divorced for 11 years, had no children, and had lived in Richmond for 10 years. She had been employed in an administrative job at IBM for nine years, had attended some regular college and was a graduate of business college. She had served on a civil jury in a medical malpractice case, and that jury had reached a verdict. This was a positive experience for her. Question 20 asked, "Do you have a favorable, neutral, or unfavorable opinion of your African-American or black co-workers?" She responded: "Being an African-American myself, I am favorable." None of her other answers contained information that would give pause to either side.

During oral questioning, Ms. T. stated that her house had been "robbed" five or six years ago and that no arrest had been made for it. In examining Ms. T.'s questionnaire, the trial court noted that she had omitted answers to questions 57 and 58 (out of a total of 64 questions, spanning 17 pages) asking for her opinions about prosecuting attorneys and criminal defense attorneys. Ms. T. said she made a mistake in omitting answers to those questions, but did so only because she had no opinions on those topics. In the six or so

other questions asked, Ms. T. gave no answer that would provide a race-neutral reason for finding her unsuitable as a juror. Indeed, the court asked only 10 questions in all, and the prosecutor declined the court's invitation to ask follow-up questions.

No basis other than race appears for the prosecutor's peremptory challenge of Ms. T. Her name was never mentioned by counsel or the court during argument on either of the *Wheeler* motions. The fact that she left questions 57 and 58 blank cannot be credited as a valid justification in light of the fact that the same thing was done by white juror number 7 (questionnaire # 50) who also explained he had no opinions on the subject of those questions, and by white juror number 10 (questionnaire # 89).

Ms. T.'s answer to question 20 that she had a favorable opinion of African-American co-workers cannot be credited as a valid reason for the peremptory challenge. The only factor that distinguishes her from the many other jurors who gave the same answer is that she is African-American. White juror number 3 (questionnaire # 47), Hispanic/Latino juror number 6 (questionnaire # 78), and white juror number 8 (questionnaire # 10) all answered that they had favorable opinions of their African-American co-workers, and none was challenged by the prosecutor.

Sara E.

Sara E.'s questionnaire revealed that she was 36 years old, had never been married, and had lived in West Contra Costa County for 19 years. She had worked for Pacific Bell for 13 years, performing wiring for telephone service. Her car had been broken into five years before. She had served on a criminal jury in a robbery case in the early 1980's and that jury had reached a verdict. Question 63 asked a prospective juror whether filling out the questionnaire changed his or her attitude in any way about sitting as a juror in this case. She wrote: "I had no feelings one way or the other about sitting as a juror until I found out who the victim was. I am deeply saddened that it was an eighteen month old child. Based on the evidence brought forward, I will not allow my emotions to get in the way of the verdict." (Emphasis in original.)

During questioning on voir dire, the court mentioned that Ms. E. had failed to answer question 30, which asked whether she or a family member had ever been arrested.

Ms. E. responded that one of her parents had been arrested for robbery in another location over 35 years ago. As previously mentioned, Ms. E. was 36 years old. She knew nothing about how the police or district attorney had treated her parent.

Written question 40 inquired whether the fact that this case involved an allegation of murder and child abuse of an 18-month-old child would affect the juror's ability to be fair and impartial. Ms. E. wrote "don't know." The court asked how she felt about that now, and she replied that she could be fair and impartial.

Declining the court's explicit invitation to ask follow-up questions, the prosecutor immediately challenged Ms. E. At that point, defense counsel made his first *Wheeler* motion.

With regard to Sara E., the trial court cited the following factors in refusing to find a prima facie case: (1) She failed to answer question 30 on the written questionnaire regarding an arrest in the juror's family; (2) her parent had been arrested for robbery over 35 years ago; and (3) she wrote on the questionnaire that because of the child abuse facts, she didn't know if she could be fair and that she had emotions and feelings which may have caused concern.[4] The court stated: "Even through the answers tend to lean in the favor of the prosecution in the case, neither side would want a juror deciding a case based upon emotions, rather than the facts and the evidence."

Appellant contends that this explanation for the court's refusal to find a prima facie case of group bias ignores and is inconsistent with several highly relevant circumstances. He argues, first, that omitting an answer on a 17-page, 63-item questionnaire could not possibly be deemed a legally valid, race-neutral reason for

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[4] In defense of the trial court's ruling, the dissent mentions as an additional justification the fact that Sara E. answered "yes" to question 28: "Do you have any legal training or have you taken any law courses?" The same answer was given by juror number 11, who was not challenged. The trial court attached so little significance to Sara E.'s answer that it did not query her on it during voir dire, whereas juror number 11 was questioned at length about her legal training and experience (pre-law as an undergraduate; worked at law firm in high school and college).

challenging Ms. E. in light of the fact that white members of the venire who failed to answer questions served on the jury without objection from the district attorney.

The arrest of Ms. E.'s parent over 35 years ago, when Ms. E. was an infant, cannot fairly be considered a race-neutral reason for her challenge, appellant argues, because the prosecutor failed to challenge several whites who served on the jury who themselves or whose families were much more recently the subject of criminal charges. Juror number 9's brother was arrested for battery on a police officer just three years earlier. The brother of alternate juror number 1 was arrested for statutory rape seven years earlier. Finally, three other seated jurors had themselves been arrested for driving under the influence of alcohol or a related charge.

Appellant argues that the trial court mischaracterized Ms. E.'s written response "don't know" to question 40, which inquired whether there was anything about the nature of the charges that caused her to question her ability to be fair and impartial. The court characterized this answer as saying Ms. E. didn't know if she could be fair. But this discounts Ms. E.'s clarification of the ambiguity of her written answer by her oral statement to the court that she believed she could be fair and impartial.. Further, as might be expected, Ms. E. was hardly the only member of the venire to initially express an emotional reaction to child abuse charges. Answers to the questionnaire given by numerous other jurors, both female and male, also indicated abhorrence of child abuse but, like Ms. E., later orally affirmed that they could nonetheless be fair and impartial, and were not challenged by the prosecution.

Considering the record in its entirety, and giving particular weight to the considerations our Supreme Court identified as relevant in *Wheeler*,[5] we determine that

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5 With respect to the type of evidence that may be used to establish a prima facie case of group bias, the *Wheeler* court stated that the moving party "may show [1] that his opponent has struck most or all of the members of the identified group from the venire, or [2] has used a disproportionate number of his peremptories against the group. [3] He may also demonstrate that the jurors in question share only this one characteristic—their membership in the group—and that in all other respects they are as heterogeneous as the

appellant established a prima facie case that the prosecution's use of peremptory challenges to excuse Clodette T. and Sara E. reflect group bias.[6] The prosecutor struck all African-Americans on the venire; used a disproportionate number of his peremptory challenges against members of that racial group (3 out of 3 or 100% of the African-Americans, versus 9 out of 40 or 22% of the other prospective jurors);[7] completely excluded African-Americans from the jury ; failed to engage in any questioning whatsoever of any prospective African-American juror despite invitations to do so from the court, and despite a warning to the district attorney that his conduct seemed "very close" to a *Wheeler* violation. In addition, two of the three African-American members of the venire (Sara E. and Ruby L.) were peremptorily challenged immediately after the trial court completed its routine questioning. Finally, as earlier discussed, the record is bereft of any race-neutral explanation for these challenges. Nothing in the oral or written responses on voir dire of Clodette T. and Sara E., or anything else in the record, significantly differentiates them from members of the venire who served on the jury. Nor is there anything in their testimony suggesting they would be hostile to the prosecution; indeed, as the court observed, Sara E.'s answers "tend to lean in favor of the prosecution." We are, in short, unable to find any basis in the record for the trial judge's

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community as a whole. [4] Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or to ask them any questions at all." (22 Cal.3d at pp. 280-281.)

6 A new trial is required if there was a prima facie case of a *Wheeler* violation as to *even one* of a cognizable group of prospective jurors. (*People v. Montiel, supra,* 5 Cal.4th 877, 909; *People v. Fuentes* (1991) 54 Cal.3d 707, 716, fn. 4.) Accordingly, our finding of a prima facie case as to Ms. T. and Ms. E. makes it unnecessary to review the validity of the peremptory challenge to Ruby L., the third and last potential African-American juror, who the trial court seemed to believe might be unable to fully understand the proceedings.

7 The prosecutor exercised a total of 12 peremptory challenges, defense counsel exercised 16 such challenges.

stated conclusion that "[t]he People are not exercising challenges based on group bias, rather than individual bias."

It appears to us that the court's determination that appellant failed to establish a prima facie case of group bias was based not on the existence of a persuasive race neutral explanation—because neither the district attorney nor the court produced such a reason—but on the belief that the presumption a party exercising a peremptory challenge is doing so on a constitutionally permissible ground can be rebutted only on a stronger showing of group bias than a reasonable inference. But, as we have explained, that theory, which is at the heart of the opinion in *People v. Bernard, supra*, 27 Cal.App.4th at p. 465, has been repudiated by the Supreme Court. For purposes of establishing a prima facie case of a *Wheeler* violation, an inference is "reasonable," or a likelihood "strong" if the record provides no *apparent* race-neutral reason for exercising a peremptory challenge. That is the case here.

The trial court's refusal to find a prima facie case ended the inquiry before the prosecutor would have been required to provide justification for his challenges. If the prosecutor had a reasonable race neutral explanation for peremptorily challenging these two members of the venire, it simply does not appear in the record. When, as here, no prima facie case is found and thus no explanation given, the reviewing court is left to speculate about possible explanations which, in this case, are not readily apparent. It may reasonably be inferred from the record that the district attorney excluded Clodette T. and Sara E. because of their race, as that is the only discernible difference between these members of the venire and those who served on the jury. As earlier noted, in reviewing California trial court compliance with *Wheeler*, which it treats as the functional equivalent of *Batson* (*McClain v. Prunty, supra,* 217 F.3d 1209, 1216, fn. 2; *Tolbert v. Page, supra,* 182 F.3d 677, 679 (en banc)), the Ninth Circuit has repeatedly declared that peremptory challenges "cannot be lawfully exercised against potential jurors of one race unless potential jurors of another race with comparable characteristics are also challenged." (*McClain v. Prunty, supra*, 217 F.3d at p. 1221; *Turner v. Marshall, supra,* 121 F.3d 1248, 1251, cert den. 522 U.S. 1153 (1998).) That test has not been met in this

case. By unjustifiably relieving the district attorney of the responsibility to provide a race-neutral explanation for these exclusions, the trial court abused its discretion and a new trial is therefore required. (*People v. Montiel, supra*, 5 Cal.4th at p. 909; *People v. Fuentes, supra*, 54 Cal.3d at p. 716, fn. 4.)

This might easily have been avoided. "The procedure designed in *Wheeler* to prevent racial discrimination in jury selection, and preserve public confidence in our courts, is not onerous. Ordinarily it takes but a few moments for a party who uses a peremptory challenge to explain why an objecting adversary has failed to establish a prima facie case or, if the court finds a prima facie case has been established, to provide a racially neutral explanation for the challenge if this can be done. Trial courts should not lightly relieve counsel of these important responsibilities, either by too readily accepting vague explanations (see, Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges* (1990) 76 Cornell L.Rev. 1 at pp. 97-98; Bell, *Race, Racism and American Law* (3d ed. 1992) § 5.16.4, p. 383) or, as appears to have occurred here by elevating the 'strong likelihood' standard to a level that can rarely be met by trial counsel, who are ordinarily in the difficult position of having to prove a negative, and must do so without the opportunity for preparation in advance under the considerable pressures imposed by trial proceedings." (*People v. Buckley, supra*, 53 Cal.App.4th at pp. 681-682, dis. opn. of Kline, P.J., fn. omitted.)

II.

Appellant has challenged a number of evidentiary rulings, which we will briefly address for purposes of guidance in the event of retrial. Since our purpose is only to provide guidance for the future, we do not address claims about whether objections were properly raised and preserved. Nor do we address appellant's claim that the prosecutor committed misconduct by switching theories as to the instrumentality of death, because this does not involve an evidentiary ruling. We trust this matter can be addressed in appropriate in limine motions prior to trial.

A.

The Pertinent Facts

The murder victim, 19-month-old Janika Price, and her mother Jennifer Shelton were living with appellant, his two- and three-year-old sons, and his aunt Linda Green and her son. Appellant was not Janika's father. Shelton had known appellant for six or seven months and had moved in with him, but it was not a good relationship. Appellant was physically abusive to Shelton and beat her frequently.

On February 19, 1996, appellant and Shelton argued about Janika. Shelton complained that appellant played too roughly with Janika. Appellant accused Shelton of spoiling Janika. Appellant hit Shelton in the face, kicked her in the foot, and kicked her again as she lay on the floor. When appellant left, Shelton fell asleep in the bedroom. She woke up when she heard Janika crying. The crying was unusual and sounded like Janika was hurt. A few minutes later, Shelton went into Janika's room and found her lying on her bed with her face to the wall. Shelton leaned down to kiss Janika and noticed she was pale and wheezing. Shelton asked appellant whether something was wrong with Janika. Appellant said Janika had thrown up, and he had cleaned her up and put her in bed. Shelton picked Janika up, discovered she was limp, and brought her into the living room.

Shelton called 911. In the meantime, appellant came in, picked up Janika, and gave her some water. Janika drank the water, but went limp again. Paramedic Robert Duvall arrived at 10:31 p.m., within three minutes of the 911 call. He asked what had happened, and appellant told him Janika had fallen out of her crib around 4:00 p.m. but had been fine until the 911 call. Duvall observed a bruise on her forehead that was consistent with a fall. There was light bruising and some vomit on her chest. She had no blood pressure or pulse, and her pupils were fixed and dilated. Janika had been dead for at least six minutes.

Dr. Brian Peterson, who performed the autopsy on Janika, testified that the cause of death was blunt force injuries to the chest, causing the heart to rupture. Such injury would cause death within a minute or so. There could be vomiting within this period.

Janika's body had other injuries, scars, and bruises that indicated a pattern of child abuse. According to Dr. Peterson, it would take a substantial amount of force, such as a hard punch or a sharp kick, to cause the heart to rupture. Dr. Peterson likened the amount of force to that which an unrestrained driver would suffer in an automobile collision at freeway speed. Accidentally stepping on the child would not have been sufficient to cause the fatal injury.

Detective David Krastof testified that he interviewed appellant twice at the police station on February 20, after Krastof had met with Dr. Peterson. The first interview was videotaped, but only the sound portion was recorded correctly. The second interview was fully videotaped. Both tapes were played for the jury.

In his first interview, appellant initially denied having had a fight with Shelton on the night of Janika's death, but later admitted they had an argument. Appellant said nothing about hitting Shelton. Appellant said he was putting up some posters in the children's room while Janika played with his sons. Janika threw up on her bed. Appellant cleaned her up. Shelton came in, said Janika was not breathing right, and took her into the other room. Appellant claimed he performed cardiopulmonary resuscitation (CPR) on Janika after she stopped breathing, but did so by applying only light pressure. When Krastof said appellant's story did not match reports from the pathologist, appellant asked for a lawyer. Krastof placed appellant under arrest.

A few hours later, after talking to his mother, appellant said he wanted to resume talking. In this second videotaped session, appellant admitted he had a violent fight with Shelton. He dragged Shelton by her hair into the bedroom, slapped and kicked her and then went into the kids' room to clean up. When Janika threw up, appellant cleaned her face and put her down. Shelton came in a little later, picked up Janika, and noticed she was not breathing right. Appellant looked at Janika, gave her some water, and she stopped breathing. Appellant put Janika on the table, breathed into her mouth, and hammered on her chest, twice, "pretty hard."

Krastof advised appellant his story was not consistent with the medical evidence. Appellant then said he had been chasing a rat around the kids' room. While chasing the

rat, he accidentally stepped on Janika's chest. He picked her up. She was screaming, but she seemed fine. She threw up right after he put her on the bed. Appellant insisted he did not kick Janika. Krastof insisted the evidence showed otherwise, and appellant eventually changed his story to say that he had accidentally kicked Janika in the chest when he backed up. Appellant said: "I did kick her. . . . I didn't know I kicked her until I explained myself just now, when I jumped back." Appellant said he lied initially because he did not want to be seen as a murderer. Appellant continued to insist that his kicking Janika's chest was an accident.

Detective Krastof saw some small bruise marks on Janika's forehead. He located appellant's BB gun under a boat at a residence two houses away and fired it at the arm of another officer. Krastof testified that the marks made by the BBs on the officer's arm were similar to the marks on Janika's face.

Appellant testified in his own defense. In the early evening on February 19, 1996, he and Shelton had a fight in which he grabbed her by the hair, knocked her down, and kicked her a couple of times. He admitted that he had been violent with Shelton before. After the fight he went into the children's room to put up some posters and clean it. All three children were there. As he moved the boys' bed, he saw a rat. Appellant put Janika on the bed and asked the boys to help him catch the rat that had run into the closet. He got a BB gun to shoot the rat. The boys shook the clothes, and the rat ran out. Appellant jumped back as the rat came toward him and stepped on Janika. Janika screamed, and he picked her up to console her.

Several minutes later, Shelton came into the room and said Janika was not breathing right. Appellant's aunt, Linda Green, said the same thing a few minutes later. Appellant went into the living room where Shelton told him Janika was not breathing. Appellant picked up Janika and gave her some water. Janika stopped breathing and went limp. Appellant told his aunt to call an ambulance and began doing CPR. Appellant hit Janika on the chest, trying to "jump start" her heart, as he had seen it done on television. Appellant denied ever physically abusing or intentionally hurting Janika. He also denied ever shooting her with a BB gun.

Appellant's aunt Linda testified that she had heard the fight in the bedroom, had seen appellant and the boys chasing a mouse, and had previously seen mice in the apartment. She did not hear Janika cry. She confirmed that Janika was breathing "funny," that appellant gave her some water, after which Janika went limp. Appellant tried to administer CPR and hit Janika in the chest in doing so.

To dispute the timing of events provided by defense witnesses, the prosecution offered the rebuttal testimony of appellant's next-door neighbor, Terry Davidson. He heard physical fighting and a woman scream, "[y]ou killed her," "[o]h my God, she's dead." The police arrived 15 to 20 minutes later.

To rebut appellant's claim that he would not let anything happen to his boys, the prosecution offered the testimony of Tammy Keller, the cousin of appellant's ex-wife. Keller testified that appellant walked in, uninvited, to the apartment she was sharing with appellant's ex-wife on August 27, 1993. He seemed very upset. When the ex-wife called, appellant got on the phone and became even more angry and started screaming, even though the boys were asleep. Appellant ignored Keller's request to lower his voice and instead proceeded to urinate in the sink on her dishes. The third time she asked him to lower his voice, he ripped the phone out of the wall. Appellant then went on a rampage. He picked up his son, Jay, Jr., and carried him like a football. While still holding the child, appellant threw a fish tank through a window, broke the glass coffee table, and tried to throw the television set out the window. Appellant bumped Jay's head on the door frame and on the television set. Keller tried to stop appellant from leaving with Jay, Jr., but appellant pushed past her.

B.

The Videotaped Interviews

Appellant contends the trial court erred in admitting the lay opinions of officers Krastof and Cope contained in the videotapes in which they repeatedly stated their opinions that appellant was lying. A police officer's personal opinion regarding the credibility of an interviewee generally is inadmissible either as lay testimony or as expert testimony and should have been redacted upon proper objection. (*People v. Melton*

(1988) 44 Cal.3d 713, 744; *People v. Smith* (1989) 214 Cal.App.3d 904, 915-916; *People v. Sergill* (1982) 138 Cal.App.3d 34, 40.)

C.

Impeachment of Jennifer Shelton

Defendant moved to exclude testimony by Jennifer Shelton as to his prior acts of domestic violence on her because the current trial pertained only to the death of Janika Price. He was convicted in the prior trial of battery on Jennifer Shelton based on the beating he inflicted immediately before Janika's death. The trial court, however, ruled that the evidence of prior abuse would be admissible to explain why Shelton changed her testimony between the preliminary examination and the first two trials.

Shelton testified on direct examination at the current trial as follows: Appellant had physically assaulted her about once a week during the six or seven months they lived together. When she testified at the preliminary examination, her testimony, which was supportive of appellant, was not totally truthful because she did not believe that appellant could do something that "hateful." She further testified that appellant had a "temper."

Appellant correctly contends that this evidence was inadmissible on the ground stated. Reference to Shelton's preliminary hearing testimony was inadmissible hearsay. It was not admissible under Evidence Code section 1235 as a prior inconsistent statement because there was no inconsistency. Shelton admitted in her testimony at the current trial that her preliminary hearing testimony was false. Thus, it would only have been admissible as a prior consistent statement under Evidence Code section 1236 if her credibility had been challenged, which it had not. (Evid. Code, §§ 1236, 791.) It was improper bootstrapping to introduce the otherwise inadmissible history of domestic violence for the purpose of explaining Shelton's preliminary hearing testimony which was inadmissible and irrelevant.

D.

Testimony of Tammy Keller

Appellant contends that the court erred in allowing Tammy Keller to testify on rebuttal about his trashing his ex-wife's apartment. Keller was the cousin of appellant's

ex-wife, Holly Eastman, who was the mother of appellant's two sons. She testified that she was living with Holly and her two children on August 27, 1993, when appellant came over while Holly was not there. Appellant spoke to Holly on the telephone and argued with her. After that, appellant went on a rampage. He ripped the telephone out of the wall and urinated on the dirty dishes in the kitchen sink. Appellant picked up his son and carried him under his arm. He threw a fish tank through the window, broke the glass coffee table, and tried to throw the television through the window. During the course of this, appellant accidentally bumped the child's head on the door and on the television.

The trial court ruled that Keller's testimony was admissible to impeach appellant's testimony that "Jay and Justin knew I'm not going to let nothing happen to them. Any time they with they daddy, they know they're protected." We agree with appellant that the evidence should have been excluded under Evidence Code sections 352 and 1101 in that its minor probative value was far outweighed by the prejudicial effect.

E.

The BB Gun Experiment

Appellant contends that the trial court erred in allowing officer Krastof to testify that the bruise marks on Janika's face appeared similar to the marks caused by shooting a fellow officer with a BB gun. We agree. A witness may not give expert testimony on an experiment without a showing that the witness has the necessary expertise. "The proponent of experimental evidence bears the burden of production and proof on the question whether such evidence rests on an adequate foundation." (*People v. Bonin* (1989) 47 Cal.3d 808, 847.) "Admission of such evidence depends upon proof of the following foundational items: (1) The experiment must be relevant; (2) it must have been conducted under at least substantially similar, although not necessarily absolutely identical, conditions as those of the actual occurrence; (3) the qualifications of the individual testifying concerning the experimentation must be demonstrated with some particularity; and (4) evidence of the experiment will not consume undue time, confuse the issues, or mislead the jury." (*People v. Turner, supra*, 8 Cal.4th at p. 198.)

Here, there was no showing that officer Krastof had any training, experience, or expertise regarding BB gun strike marks. Nor was there any showing of expertise to qualify him to give an opinion on whether an injury on an adult's arm resembles another injury on a child's face.

III.

DISPOSITION

The judgment is reversed.

Kline, P.J.

I concur:

Lambden, J.

People v. Johnson, No. A085450
Dissenting Opinion of Haerle, J.

For at least four different reasons, I respectfully but strongly dissent.

1. First of all, the majority apparently believes that footnote 7 in our Supreme Court's opinion in *People v. Box* (2000) 23 Cal.4th 1153, 1188 (*Box*), signals a major shift from its previous position regarding the applicable test under *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*) and *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*). I disagree; clearly, all our Supreme Court was saying by that footnote was: "these two terms mean the same thing to us and always have, so what's all the fuss about?"

That fuss was, as the majority suggests, the result of an opinion of a panel of the Court of Appeals for the Ninth Circuit, *Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190 (*Wade*). While affirming a lower court's denial of a petition for a writ of habeas corpus, *Wade* spent considerable space gratuitously suggesting that past California Supreme Court opinions had differentiated between the two standards and had, erroneously, applied only the "'strong likelihood'" standard.[1] (*Wade, supra,* 202 F.3d at pp. 1195-1198.)

The *Wade* opinion appeared in print in February 2000, after *Box*, a capital case, had been fully briefed.[2] Obviously, our Supreme Court wanted to promptly reassure the lower courts of this State that, the Ninth Circuit panel to the contrary,

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1 The extended essay offered by the Ninth Circuit panel was unnecessary to its result because it ultimately affirmed the federal district court's denial of a petition for a writ of habeas corpus. That denial and affirmance brought to an end an attack on the Contra Costa Superior Court's handling of a *Wheeler* motion set forth in detail in our decision in *People v. Buckley* (1997) 53 Cal.App.4th 658 (*Buckley*). In *Buckley*, with Presiding Justice Kline dissenting, we upheld the trial court's ruling that that appellant had not established a prima facie case that the prosecution's challenges were based on race. Our Supreme Court denied review in *Buckley* (see 53 Cal.App.4th at p. 683), and our opinion has been cited several times by other appellate courts dealing with appeals of *Wheeler* challenges. (See, *People v. Walker* (1998) 64 Cal.App.4th 1062, 1069; *People v. Trevino* (1997) 55 Cal.App..4th 396, 409-410 and *Birdine v. Hubbard* (N.D. Cal.) 2000 WL 1229112, p. 3, the latter being a post-*Wade* denial of a petition for a writ of habeas corpus sought on *Batson* grounds.)

2 Appellant's reply brief in *Box* was filed January 24, 2000.

it knew what it was doing regarding the *Wheeler/Batson* standard, and it opted to do so in both a prompt and succinct way via footnote 7 of *Box*. The majority treats this as some sort of major event. This is plainly incorrect. Indeed, the Court specifically noted in that footnote (as, also, had the Ninth Circuit panel in *Wade*) that even as early as *Wheeler* (which, of course, preceded the United States Supreme Court's *Batson* decision by eight years), *both* terms were used synonymously within a page of one another. (See *Wheeler*, *supra*, 22 Cal.3d at pp. 280-281; *Wade, supra,* 202 F.3d at p. 1196.)

The long and short of all this is that, the majority of this court and *Wade* to the contrary, our Supreme Court has been using the *Batson* standard all along, and footnote 7 in *Box* did not signal any change on that issue. Additional proof of that fact came in an opinion authored by Justice Mosk and filed a few days after *Box*. (*People v. Ayala* (2000) 24 Cal.4th 243, 260.) As the majority points out in its footnote 3, in the course of that decision the Court quoted from *Box* and, in so doing, put the term "reasonable inference" in brackets after the term "strong likelihood." I don't know how that Court could have signaled more emphatically that, in its view, the two terms do now, and always have, meant the same thing.

The majority, however, is obviously not persuaded. Relying upon various and sundry dictionary definitions of the relevant terms and, even more importantly, repeated citations to federal, especially Ninth Circuit, authority, the majority contends, at least as I understand matters, that both the *Box* footnote and the bracketed phrase in *Ayala* are substantially inexplicable.[3]

I remind my colleagues in the majority that, their strong and honest feelings notwithstanding, we are an intermediate appellate court that is bound to follow the rulings of our Supreme Court, even those we feel are not adequately explained. Thus, and

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3 The majority also contends that, previously, the Court differentiated between the concepts of "strong likelihood" and "reasonable inference." It argues that in *People v. Sanders* (1990) 51 Cal.3d 471, 500-501 (*Sanders*), the Court expressed "the belief that a 'strong likelihood' of group bias requires greater evidence than a 'reasonable inference' of such bias. . . ." (Maj. opn. at p. 9.) This is simply incorrect. The Supreme Court said no such thing and, indeed, the term "reasonable inference" nowhere appears in the cited pages of *Sanders*.

because I have no difficulty understanding the (admittedly cursory) *Box* footnote, I think the majority errs in not following its clear direction.

2. Most unfortunately in my view, the majority opinion gives only lip service to the principle that an appellate court should pay deference to a trial court's ruling on a *Wheeler/Batson* motion. The majority briefly alludes to this principle (maj. opn. at p. 11), but immediately thereafter proceeds to pay no deference whatsoever to the trial court's ruling.

And it is not as if the direction to pay such deference has been vague: our Supreme Court has repeated it practically every time a *Wheeler* issue has been before it—which is a lot of times. Indeed, in the important case of *People v. Johnson* (1989) 47 Cal.3d 1194, 1221 (*Johnson*), where the Court disapproved of an earlier effort to modify the *Wheeler* standard (*People v. Trevino* (1985) 39 Cal.3d 667), the standard was articulated as one of "truly giving great deference" to the trial court. (*Johnson*, *supra*, 47 Cal.3d at p. 1221.) Most recently, in *People v. Jones* (1998) 17 Cal.4th 279, 294, the Court stressed that ""'[b]ecause *Wheeler* motions call upon trial judges' personal observations, we view their rulings with "considerable deference" on appeal.'"" To the same effect are the Court's holdings in *People v. Howard* (1992) 1 Cal.4th 1132, 1155, *People v. Crittenden* (1994) 9 Cal.4th 83, 117, and *People v. Mayfield* (1997) 14 Cal.4th 668, 723. Even the United States Supreme Court, in its *Batson* opinion, pointedly acknowledged this principle. It said: "Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." (*Batson, supra,* 476 U.S. at p. 98, fn. 21.)

Our Supreme Court elaborated on this rationale for the required deference in *Sanders, supra,* 51 Cal.3d 471: "We reiterate that ruling on *Wheeler* motions "'requires trial judges to make difficult and often close judgments. They are in a good position to make such determinations, however, on the basis of their knowledge of local conditions and of local prosecutors." [Citation.] They are also well situated to bring to bear on this question their powers of observation, their understanding of trial techniques, and their broad judicial experience. We are confident of their ability to distinguish a true case of

group discrimination by peremptory challenges from a spurious claim . . . .' (*Wheeler, supra*, 22 Cal.3d at p. 281, quoting Kuhn, Jury Discrimination: The Next Phase (1968) 41 So.Cal.L.Rev. 235, 295, fn. 5; see also *Johnson, supra*, 47 Cal.3d at pp. 1219-1222.) Applying this standard of giving considerable deference to the determination of the trial court, 'we see no good reason to second-guess [the trial court's] factual determination' (*Johnson, supra,* at p. 1221) that the prosecutor was not motivated by bias against Hispanics." (*Sanders, supra,* 51 Cal.3d at p. 501.)

So, how much deference does the majority pay to this trial court's "powers of observation" which necessarily impact its "evaluation of credibility," its "understanding of trial techniques," or its "broad judicial experience"? The answer is disturbing: aside from a single mention of the word "deference" (maj. opn. at p. 11), none at all. Thus, the majority (1) totally avoids the trial court's careful statement of its reasons for concluding that no prima facie case of discrimination was shown by the prosecution's peremptory challenge of prospective juror Ruby L. (maj. opn. at p. 20, fn. 6) and (2) totally reevaluates, as if it were the trial court itself, the validity of that court's reasons for coming to the same conclusion regarding prospective juror Sara E. (maj. opn. at pp. 17-20).

The apogee of the majority's second-guessing of the trial court regarding that potential juror concerns that court's verbal inquiry as to whether, in light of Sara E.'s ambiguous answer to a questionnaire inquiry, she could be fair and impartial. The majority says that the trial court "discount[ed] Ms. E.'s clarification of the ambiguity of her written answer by her oral statement to the court that she believed she could be fair and impartial." (Maj. opn. at p. 19.) But it was *the trial court and not the majority* that saw and heard the answer from Ms. E. to its question and, therefore, *it is for that court and not us* to evaluate what weight, if any, to give to that answer. That is what the United States Supreme Court had in mind when it noted the ability of trial courts to "evaluat[e] . . . credibility" (*Batson, supra,* 476 U.S. at p. 98, fn. 21) and what our Supreme Court meant when it observed that trial courts have necessarily unique "'powers of

observation.'" (*Sanders, supra,* 51 Cal.3d at p. 501, quoting *Wheeler, supra,* 22 Cal.3d at p. 281.)

3. Having substantially disregarded the principle of deference, the majority compounds its error by then indulging in a multitude of comparisons of the questionnaire answers of two of the three challenged jurors to those of prospective jurors of other races.

To its credit, the majority appreciates that it is navigating in, as far as California is concerned, uncharted water. It recognizes that appellant's challenge "rests in some measure [I would have said 'almost entirely'] on a comparison of the written and oral voir dire testimony of the African-Americans excused by the prosecution with that of other prospective jurors who were not excused, which appellant claims are indistinguishable. This requires us to consider whether and, if so, to what extent such comparisons may be used to show a prima facie case of group bias. Unfortunately, this is another area in which the application of *Wheeler* by the California courts has differed somewhat from federal judicial application of *Batson.*" (Maj. opn. at p. 11.) The majority then goes on to indicate, once again, its clear preference for the federal approach, especially that espoused by the Ninth Circuit.

There is, the majority's implication to the contrary, nothing ambiguous about our Supreme Court's view of such comparative analyses. It has repeatedly admonished that such comparisons should not be undertaken by an appellate court. For example, in *People v. Turner* (1994) 8 Cal.4th 137, in rejecting an appellant's challenge to a trial court finding of no prima facie case of discrimination, the Court said: "Defendant argues, however, that this basis was insufficient here because the prosecutor did not excuse other non-Black jurors who displayed similar intellectual limitations. However, we have previously rejected a procedure that places an 'undue emphasis on comparisons of the stated reasons for the challenged excusals with similar characteristics of nonmembers of the group who were not challenged by the prosecutor,' noting that such a comparison is one-sided and that it is not realistic to expect a trial judge to make such detailed comparisons midtrial. [Citation.] [¶] . . . Moreover, 'the very dynamics of the jury selection process make it difficult, if not impossible, on a cold record, to evaluate or

compare the peremptory challenge of one juror with the retention of another juror [who] on paper appears to be substantially similar.'" (*Id.* at pp. 169-170.) More recently, the Court said precisely the same thing in *Box* (*supra,* 23 Cal.4th at p. 1190), also in the context of a prima facie ruling. (See also *People v. Fuentes* (1991) 54 Cal.3d 707, 715.)

The majority tries to avoid this rule by three patently fallacious devices. First of all, it interprets the "undue emphasis" phrase in the quoted passage from *Turner* as an invitation to put its foot in that door and try to open it further. In so doing, it carefully avoids discussing language in Supreme Court cases that make clear that the prohibition is *absolute*. Thus, in *People v. Montiel* (1993) 5 Cal.4th 877 (*Montiel*), the Court stated: "If the trial court makes a 'sincere and reasoned effort' to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. *In such circumstances, an appellate court will not reassess good faith by conducting its own comparative juror analysis.* Such an approach would undermine the trial court's credibility determinations and would discount '"'the variety of [subjective] factors and considerations,"' including 'prospective jurors' body language or manner of answering questions,' which legitimately inform a trial lawyer's decision to exercise peremptory challenges." (*Id.* at p. 909, italics added.)

Quoting this passage, the Court said even more recently: "Just as an appellate court *will not* compare the responses of rejected and accepted jurors to determine the bona fides of the justifications offered, so the trial court itself has no obligation to perform such an analysis. '[W]e fail to see how a trial judge can reasonably be expected to make such detailed comparisons mid-trial.' [Citation.] Moreover, as we have indicated, such an analysis is largely beside the point, because it ignores the legitimate subjective concerns 'that go into a lawyer's decision to select certain jurors while challenging others that appear to be similar [on the cold record].' [Citation.]" (*People v. Arias* (1996) 13 Cal.4th 92, 136, fn. 16 (*Arias*), italics added.)

I suggest that two recent doses of "will not" from our Supreme Court cannot, the majority to the contrary, translate into "may."[4]

Second, the majority argues that our Supreme Court's concern about comparative analyses obtains only in those cases where the prosecutor was either asked for or volunteered explanations concerning the questioned challenges, but does not apply in cases, such as this, where no such explanation was asked for or given. But there is absolutely no language in any of the cases cited by the majority even implying any such distinction. Indeed, several of the more recent cases containing the admonition against appellate courts engaging in comparative analyses were cases in which the trial court had ruled that no prima facie case had been established. (*Box, supra,* 23 Cal.4th at p. 1190; *People v. Turner, supra,* 8 Cal.4th at pp. 169-170.) Indeed, the only case relied upon by the majority where the admonition against comparative analyses *did not* arise in the context of a challenge regarding a prima facie case was *Johnson, supra,* 47 Cal.3d at page 1220.[5] This fact, plus the unequivocal statements in *Montiel* and *Arias*, combine

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4 The majority carefully avoids discussing the "will not" language in *Montiel* and *Arias*, and doesn't even cite the latter case. It demonstrates its inattention (to be generous) to the language used in them by saying that "our Supreme Court has not precluded comparative analyses by reviewing courts but has simply declared that they should not place an '*undue emphasis*' on such an analysis." (Maj. opn. at pp. 12-13; italics the majority's.) The majority to the contrary, I think the phrase "will not" is a pretty good hint of an intent to "preclude."

5 Both *Montiel* and *Arias* are unclear regarding the precise procedural context of their rulings. In *Montiel*, the trial court asked the prosecutor for his reasons without indicating one way or the other if it felt the defense had made a prima facie showing. (*Montiel, supra,* 5 Cal.4th at pp. 907-910.) However, the Court hinted that, in such circumstances, it might infer a finding of a prima facie case (*id.* at p. 910, fn. 8). In *Arias*, there was no such inference because the trial court indicated it has "questions" about the defense's prima facie showing (indeed, the Court itself had doubts if such had been shown); nonetheless, the prosecutor was asked for and gave his explanations. (*Arias, supra,* 13 Cal.4th at pp. 133-139.)

to demolish the distinction so laboriously constructed by the majority.

Third, the majority suggests that perhaps our Supreme Court doesn't really mean what it says regarding comparative analyses because, in two decisions, the Court itself indulged in comparisons. The majority is flatly wrong. The passage from *People v. Crittenden, supra,* 9 Cal.4th at page 119, which the majority contends reveals an inconsistency in the Court's application of this rule (maj. opn. at p. 13) does no such thing. As a simple reading of it demonstrates, the Court was simply noting that Crittenden's "comparison" argument was not even worth debating because (1) all but one of the non-African American prospective jurors who expressed doubt about the death penalty were also excused by the prosecution and (2) the only one who wasn't was called "later in the proceedings, when the prosecutor's remaining challenges were few."[6]

The majority also suggests that a few sentences in *People v. Jones, supra,* 17 Cal.4th at page 295, demonstrates that the Court endorses comparative analyses. (Maj. opn. at p. 13.) It is, I believe, constructive to quote the two sentences the majority relies upon: "The implication [of the defendant's argument] is that the Black prospective jurors were singled out for special scrutiny. On this record, however, we are constrained to disagree. There is evidence to support the court's rulings on the four Black prospective jurors in question, enough to reject the defendant's claims of *Wheeler* error." (*Id.* at p. 295.)

I simply do not understand how the majority can conclude from these three plain vanilla sentences that, contrary to its repeated and emphatic words in many other decisions, our Supreme Court in fact approves of comparative analyses of the handling of prospective jurors. Since its emphatic disapproval of the comparative analysis system espoused (and indeed undertaken) by the majority in *People v. Trevino, supra,* 39 Cal.3d 667 (see *Johnson, supra,* 47 Cal.3d at pp. 1220-1221), our Supreme Court's position has

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6 In fact, in *People v. Johnson, supra,* 47 Cal.3d at p. 1220, the Court specifically noted, by way of support for its anti-comparison stance, that "the same factors used in evaluating a juror may be given different weight depending on the number of peremptory challenges the lawyer has at the time of the exercise of the particular challenge . . . ." *Crittenden*, in the passage quoted by the majority, was simply adopting this *additional reason for avoiding comparative analyses*.

been unwaveringly negative on that subject. I hope very much that the majority in this case is not suggesting that we should return to the *Trevino* era of wholesale appellate adjudication on this subject. That is, nonetheless, the effect of its opinion. For that reason, if no other, I strongly urge the Supreme Court to grant review of the majority's decision.

4. Finally, I submit that the record before us contains ample justification for the trial court's ruling that no prima facie case had been established. It will be recalled that the ultimate ruling by the trial court under review here was as to the second defense *Wheeler* motion. That motion encompassed the prosecutor's peremptory challenges to three African-American jurors, Ruby L., Sara E., and Clodette T. The trial court made specific comments on the record regarding the apparent justifications for the challenges to the first two, Ruby L. and Sara E.. It made no specific comment regarding Clodette T.

The majority takes these three in reverse order. As far as Ruby L. is concerned, it seems to believe that the trial court's ruling regarding her is almost irrelevant. It buries its only reference to that ruling in a footnote 20 pages into its opinion (maj. opn. at p. 20, fn. 6), even though appellant specifically made it a part of his appeal. The majority simply says that, as to this prospective juror, "the trial court seemed to believe [she] might be unable to fully understand the proceedings." (maj. opn. at p. 20, fn. 6.) A slight understatement, I suggest; the trial court not only "seemed to believe" this, it clearly did and it was clearly right.

In addressing the challenge to this juror, which precipitated the second *Wheeler* motion, the trial court noted, among other things, that (1) "the Court had concerns with regard to her qualifications in this matter based upon her answers to the questionnaire," (2) Ruby L. had a sister who "had had drug charges," (3) "she herself felt that she had difficulty understanding things", and (4) her "answers on the questionnaire . . . would have justified a peremptory challenge by either side . . . ."[7]

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7 The trial court was obviously referring to Ruby L.'s answers to such questions as 37(c), 38-40, and 61. In these, she admitted that, e.g., she could not follow instructions to judge the credibility of all witnesses, including peace officers, by the same standards, could only commit to "try" to follow CALJIC No. 1.00 "regardless of the

In short, Ruby L. was a hopeless prospective juror from the prosecution's standpoint, and the trial court was clearly correct in ruling that its challenge of her neither raised nor contributed to the raising of a prima facie *Wheeler* issue. But the majority omits all this and, in so doing, does a grave injustice to the trial court. We are, after all, reviewing *the entirety* of its ruling on the *Wheeler/Batson* issue. Put another way, the issue before us is, was the trial court correct in finding, *as to these three African-American jurors*, that no prima facie violation of *Wheeler* had been shown? But, apparently, because the record as to one of those three so clearly supports the trial court's ruling and, conversely, undermines the majority's position, that portion is consigned to the near-oblivion of a footnote and, even there, half-heartedly explained. I think this is quite inappropriate. Appellate courts regularly give parties to appeals before them a hard time when they cite only the favorable-to-them parts of the record. We should pay a trial court at least the respect of reciting the *full and complete basis* of its ruling before reversing it.

As to the remaining two prospective jurors, the majority paints with a broad brush by proclaiming that "the record is bereft of any race-neutral explanation for these challenges." (Maj. opn. at p. 21.) The majority's own opinion shows that this is utterly wrong; most of the preceding four pages of its opinion are devoted to quarreling with the trial court over the proper weight to be placed upon and interpretation given to (1) Sara E.'s failure to answer question 30 regarding whether either she or a family member had ever been arrested, (2) the fact that one of her parents had, in fact, been arrested for robbery, (3) her "don't know" answer to a written question as to whether the fact that the case involved allegations of murder of a minor and child abuse would affect her ability to be fair and impartial.

But the strongest basis for the peremptory challenge to Sara E. came from her reluctant responses to the trial court's questioning of her regarding her failure to answer question 30 on the questionnaire. That revealing dialogue went like this:

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consequences," and was not sure that she could be fair, given the nature of the charges and circumstances of the

"THE COURT: . . . You or anybody close to you ever been arrested?

"MS. E.: I can answer that.

"THE COURT: Was it you or someone else?

"Ms. E.: Someone else.

"THE COURT: How is that person related to you?

"Ms. E.: Parent.

"THE COURT: What was the person arrested for?

"Ms. E. I believe it was robbery.

"THE COURT: Was that in this county or someplace else?

"Ms. E.: Someplace else.

"THE COURT: And how long ago are we talking about?

"Ms. E.: Over thirty-five years ago."

In short, it took *six* questions from the trial court to elicit a full and complete answer to question 30 on the questionnaire. I respectfully suggest that, after that series of questions and answers, any prosecutor who opted to leave Sara E. "in the box" ought to consider a different career.

Also present in the record, although not cited by the trial court,[8] is the fact that Sara E. had had "legal training," clearly a "race-neutral" reason for rejecting a prospective juror. (See *People v. Crittenden, supra,* 9 Cal.4th at p. 119.) Additionally, and as noted by the majority, she stated in answer to one of the written questions that, although she would "not allow my emotions to get in the way of the verdict," she was "deeply saddened that [the victim in the case] was an eighteen month old child." I suggest that clearly there were more than ample reasons for the prosecution to peremptorily challenge Sara E. and that, by so doing, it did not raise a prima facie case of race discrimination.

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case.

8 We are, of course, permitted to review the record for "' grounds upon which the prosecutor might reasonably have challenged' the jurors in question." (*People v. Howard, supra,* 1 Cal.4th at p. 1155; see also our opinion in *Buckley, supra,* 53 Cal.App.4th at p. 667.)

Which leaves only Clodette T. As noted both above and by the majority, the trial court made no mention of its views regarding her in its ruling that no prima facie case had been shown. But a review of the record discloses, again as noted by the majority, that (1) she was childless (this case involved the death and alleged abuse of a minor),[9] (2) the police had made no arrest after the robbery of her home five or six years ago, and (3) she omitted to answer the two questions in the questionnaire dealing with her opinions of prosecuting and defending attorneys.

I submit that, giving the required deference to the trial court, it could reasonably have found that, considered together with the ample justifications in the record for the challenges to Ruby L. and Sara E., the challenge to Clodette T. did not, either alone or in combination with the others, present a prima facie case of a violation of *Wheeler.*

Haerle, J.

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9 A Ninth Circuit case the majority omits from its encomiums to that court says that "lack of family may have appeared relevant to the prosecutor in a case involving child abuse and reasonably could be deemed to constitute a non-discriminatory basis for striking the venireman." (*U.S. v. Lewis* (9th Cir. 1988) 837 F.2d. 415, 417, cert. den. Lewis v. United States (1988) 488 U.S. 923.)

Trial Court: Contra Costa County Superior Court

Trial Judge: Honorable Patricia Sepulveda

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APPENDIX B

[No. S097600. June 30, 2003.]

THE PEOPLE, Plaintiff and Respondent, v.
JAY SHAWN JOHNSON, Defendant and Appellant.

SUMMARY

A jury found defendant, an African-American man, guilty of the second degree murder of the 19-month-old daughter of his White girlfriend and of assault resulting in the death of a child under the age of eight (Pen. Code, §§ 187, 273ab). During jury selection, the prosecutor exercised 12 peremptory challenges, using three of them to challenge all three African-American prospective jurors on the jury panel. Defendant moved to require the prosecutor to justify the challenges by showing they were not the result of bias. The trial court denied the motion in a detailed ruling. (Superior Court of Contra Costa County, No. 96-0691-4, Patricia K. Sepulveda, Judge.) The Court of Appeal, First Dist., Div. Two, No. A085450, reversed.

The Supreme Court reversed the judgment of the Court of Appeal and remanded for further proceedings. The court held that defendant failed to establish a prima facie case that the prosecutor used his peremptory challenges improperly. When a defendant seeks to establish a prima facie case of discriminatory use of peremptory challenges, California law uses two terms—"strong likelihood" and "reasonable inference"—to describe the necessary showing of group bias before the prosecution must explain its challenges. Although federal law uses the single term, "an inference of discriminatory purpose," the terms, a "strong likelihood" and a "reasonable inference," refer to the same test, and this test is consistent with the federal test. The court also held that the practice of comparing, for the first time on appeal, the answers of excused jurors with those of jurors not excused to determine whether the trial court erred in denying an objection to the prosecution's use of peremptory challenges, is unreliable, fails to give due deference to the trial court's ruling, and is not required under federal law. In this case, the trial court was in the best position to make the determination. (Opinion by Chin, J., with George, C. J., Baxter, Brown, and Moreno, JJ., concurring. Concurring and dissenting opinion by Werdegar, J. (see p. 1328). Dissenting opinion by Kennard, J. (see p. 1329).)

HEADNOTES

Classified to California Digest of Official Reports

(1a-1c) Jury § 47.6—Challenges—Peremptory—Group Bias—Prima Facie Case—Necessary Showing.—When a criminal defendant seeks to establish a prima facie case of discriminatory use of peremptory challenges to prospective jurors, California law uses two terms—"strong likelihood" and "reasonable inference"—to describe the necessary showing of group bias before the prosecution must explain its challenges. Although federal law uses the single term, "an inference of discriminatory purpose," the terms, a "strong likelihood" and a "reasonable inference," refer to the same test, and this test is consistent with the federal test. Under both tests, to state a prima facie case, the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias. Thus, California's standard for establishing a prima facie case of discriminatory use of peremptory challenges is, and always has been, compatible with federal law. It merely means that to state a prima facie case, the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias.

[See 5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 495 et seq.; West's Key Number Digest, Jury ⇐ 33(5.15).]

(2a-2d) Jury § 47.9—Challenges—Peremptory—Group Bias—Prima Facie Case—Appellate Review—Comparative Juror Analysis.—The practice of comparing, for the first time on appeal, the answers of excused jurors with those of jurors not excused to determine whether the trial court erred in denying an objection to the prosecution's use of peremptory challenges, is unreliable and fails to give due deference to the trial court's ruling. This rule against comparative juror analysis for the first time on appeal does not violate any requirement of federal constitutional law. However, the rule has never prohibited trial courts from doing so or the party objecting to the challenges from relying on such analysis in seeking to make a prima facie case. When the objecting party presents comparative juror analysis to the trial court, the reviewing court must consider that evidence, along with everything else of relevance, in reviewing, deferentially, the trial court's ruling. When such an analysis was not presented at trial, a reviewing court should not attempt its own comparative juror analysis for the first time on appeal, especially when the record supports the trial court's finding of no prima facie case. While the practice is not prohibited outright, comparative

juror analysis for the first time on appeal would very rarely be fruitful or appropriate.

(3) **Jury § 47.9—Challenges—Peremptory—Group Bias.**—Exercising peremptory challenges because of group bias rather than for reasons specific to the challenged prospective juror violates both the California Constitution and the United States Constitution.

(4) **Jury § 47.9—Challenges—Peremptory—Group Bias—Prima Facie Case—Appellate Review—Comparative Juror Analysis—Rule of Deference.**—If the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered for peremptory challenges, its conclusions are entitled to deference on appeal. In such circumstances, an appellate court will not reassess good faith by conducting its own comparative juror analysis. Such an approach would undermine the trial court's determinations of credibility and would discount the variety of subjective factors and considerations, including prospective jurors' body language or manner of answering questions, which legitimately inform a trial lawyer's decision to exercise peremptory challenges. The concerns about the inability of a reviewing court to judge the dynamics of jury selection on a cold record also apply when the trial court determines whether the objector has established a prima facie case to begin with.

(5) **Jury § 47.7—Challenges—Peremptory—Group Bias—Prima Facie Case.**—The trial court did not err in denying the motion of an African-American man, charged with the murder and assault resulting in death of his White girlfriend's baby, to require the prosecutor to justify his peremptory challenges of all three African-American prospective jurors on the panel. The record suggested grounds for the prosecutor to have reasonably challenged the jurors. The trial judge, who had performed much of, and observed the remainder of, the voir dire, and thus was in the best position to determine under all the relevant circumstances of the case whether a prima facie showing existed, mentioned reasons as to two of the jurors. The court noted that these reasons did not warrant a challenge for cause, but peremptory challenges need not be based on grounds for a challenge for cause. Although the trial court did not specifically discuss the third of the challenged jurors, at trial, defendant did not argue that no reason existed to challenge that juror. That all three African-American prospective jurors were removed was obviously highly relevant to whether a prima facie case existed, and the trial court gave it careful scrutiny, considered the question close, but found no prima facie case under all the circumstances. It would not be

appropriate to second-guess its determination by attempting a comparative juror analysis for the first time on appeal.

(6) **Jury § 47.7—Challenges—Peremptory—Group Bias—Prima Facie Case—Failure to Question Jurors.**—In considering the motion of an African-American man, charged with the murder and assault resulting in death of his White girlfriend's baby, to require the prosecutor to justify his peremptory challenges of all three African-American prospective jurors on the panel, the fact that the district attorney asked no questions of the African-American jurors he challenged was of little or no significance. At the time, the trial court had primary responsibility for conducting voir dire, and the district attorney also asked no questions of any prospective juror, including the nine of other ethnic groups he also challenged.

COUNSEL

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OPINION

CHIN, J.—During jury selection, each party is entitled to a limited number of peremptory challenges. (Code Civ. Proc., § 231.) However, exercising peremptory challenges to remove prospective jurors solely because of group bias, for example, on racial grounds, violates both the California Constitution (*People v. Wheeler* (1978) 22 Cal.3d 258 [148 Cal.Rptr. 890, 583 P.2d

748] (*Wheeler*)) and the United States Constitution (*Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69] (*Batson*)). Both *Wheeler* and, later, *Batson* established procedures for courts to follow when one party objects to the other party's peremptory challenges. Defendant contends that California's procedures violate *Batson* in two respects.

(1a) First, although both *Wheeler* and *Batson* require the objector to establish a prima facie case of discriminatory use of peremptory challenges before the other party must explain its challenges, *Wheeler* used two terms—"strong likelihood" and "reasonable inference"—to describe the necessary showing of group bias; *Batson* used the single term, "an inference of discriminatory purpose." (*Batson*, *supra*, 476 U.S. at p. 94 [106 S.Ct. at p. 1721]; *Wheeler*, *supra*, 22 Cal.3d at pp. 280-281.) Defendant argues that the "strong likelihood" standard states a different, and higher, requirement for establishing a prima facie case than *Batson* permits.

(2a) Second, we have observed that comparing, for the first time on appeal, the answers of excused jurors with those of jurors not excused to determine whether the trial court erred in denying an objection to the use of peremptory challenges is unreliable and fails to give due deference to the trial court's ruling. (E.g., *People v. Box* (2000) 23 Cal.4th 1153, 1190 [99 Cal.Rptr.2d 69, 5 P.3d 130]; *People v. Montiel* (1993) 5 Cal.4th 877, 909 [21 Cal.Rptr.2d 705, 855 P.2d 1277]; *People v. Johnson* (1989) 47 Cal.3d 1194, 1220-1222 [255 Cal.Rptr. 569, 767 P.2d 1047].) Defendant contends that this rule against "comparative juror analysis" violates *Batson*.

(1b) We conclude that *Wheeler*'s terms, a "strong likelihood" and a "reasonable inference," refer to the same test, and this test is consistent with *Batson*. Under both *Wheeler* and *Batson*, to state a prima facie case, the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias. **(2b)** We also conclude that *Batson* does not require state reviewing courts to engage in comparative juror analysis for the first time on appeal. Finally, applying California's procedures, which satisfy *Batson*, to this case, we uphold the trial court's finding that defendant failed to establish a prima facie case that the prosecutor used his peremptory challenges improperly.

Accordingly, we reverse the judgment of the Court of Appeal, which reached contrary conclusions.

I. FACTS AND PROCEDURAL HISTORY

A jury found defendant guilty of the second degree murder of the 19-month-old daughter of his girlfriend and of assault resulting in the death of a child under the age of eight. (Pen. Code, §§ 187, 273ab.) The issues before us solely involve jury selection, so we focus on that process.

The district attorney exercised 12 peremptory challenges. He used three of them to challenge all three African-American prospective jurors on the jury panel—C.T., S.E., and R.L. After the second of these challenges, defendant made a "*Wheeler* motion." (*Wheeler*, *supra*, 22 Cal.3d 258.) He stated that his motion, "[m]ore specifically . . . concerns [S.E.], the last individual who was eliminated by the People." He argued the prosecutor had no apparent reason to challenge this prospective juror "other than [her] racial identity." He made no argument regarding C.T. The court responded that, "based on the record that's been made, [it] would find that there's not been shown a strong likelihood that the exercise of the peremptory challenges were based upon a group rather than an individual basis. The Court has to start from the position of a premise that the exercises of the peremptory challenges were based on constitutional grounds." The court also told the district attorney, however, that "we are very close."

After the third of these challenges, defendant renewed his *Wheeler* motion. Focusing this time on the most recent challenge, he based his motion on the circumstance that the district attorney had removed all of the African-American prospective jurors. The court denied the motion in a detailed ruling. Regarding the most recent challenge, the court stated that it had had "concerns with regard to her qualifications in this matter based upon her answers on the questionnaire; specifically, the Court had noted that she had a sister who had had drug charges, although her answers in follow-up verbally were such that the Court would not have found that the issues were such to lead to a challenge for cause. May be sufficient to justify a peremptory challenge by the People. [¶] Also, with regard to her answers generally on the questionnaire itself, there was an indication that she had difficulty understanding some of the issues, and specifically, her last response which was somewhat rambling on the questionnaire indicated that she herself felt that she had difficulty understanding things. Again, her verbal responses here in court were such that I would not have granted a challenge for cause on that basis, but the Court felt that the answers on the questionnaire were sufficient that they certainly would have justified a peremptory challenge by either side, frankly, based upon the concerns about her ability to understand the proceedings."

The court noted the rest of the district attorney's challenges were against "all other types of groups, including white women and white men as well." Regarding S.E., the court stated that it had been concerned about her, "including the answer on question thirty that she gave verbally here in court

that she had not included in her questionnaire; a parent had a robbery or arrest, even though that was a number of years ago, thirty years ago. Her answers on the record were not as such that I would have granted a challenge for cause. Certainly, they could justify a challenge by the People. [¶] She expressed on the record that she didn't know if she could be fair. Her verbal follow-up responses were not such that I would have granted a challenge for cause. And also based upon the answers with regard to question sixty-three . . . her emotions and feelings, again, her answers were such that they may have caused concern for either side. Even though the answers tend to lean in the favor of the prosecution in the case, neither side would want a juror deciding a case based upon emotions, rather than the facts and the evidence." "In summary," the court said, "with regard to the jurors, while the Court would not grant the challenges for cause, there were answers . . . at least on the questionnaires themselves such that the Court felt that there was sufficient basis for the peremptory challenge. [¶] Even with the addition of [the most recent challenge], the Court will not find a prima facie case."

The Court of Appeal reversed the judgment. It found that the "strong likelihood" standard the trial court applied violated *Batson*, *supra*, 476 U.S. 79. Based primarily on its own comparison of answers the challenged jurors gave with answers of nonchallenged jurors, the court concluded that "a prima facie case of group bias was established and that the judgment must therefore be reversed." Justice Haerle dissented on all points.

We granted the Attorney General's petition for review.

II. DISCUSSION

A. *Background*

(3) Exercising peremptory challenges because of group bias rather than for reasons specific to the challenged prospective juror violates both the California Constitution and the United States Constitution. (*Batson*, *supra*, 476 U.S. 79; *Wheeler*, *supra*, 22 Cal.3d 258.) Because *Wheeler* predated *Batson*, the *Wheeler* court obviously did not have the benefit of *Batson* in establishing the procedures to follow in California. Defendant argues that California's procedures violate *Batson* in two respects: (1) *Wheeler*'s "strong likelihood" standard, or at least the way it was understood and applied in later cases, is a higher standard than *Batson* permits; and (2) California law impermissibly restricts comparative juror analysis. We discuss these contentions in order below, then review the trial court's rulings. But first, to fully understand these issues, it is necessary to review *Wheeler* and *Batson* in detail.

1. *Wheeler*

In *Wheeler*, we concluded "that the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates" the California Constitution. (*Wheeler*, *supra*, 22 Cal.3d at p. 276.) We then turned to the difficult question of what to do when one party objects to the other party's peremptory challenges on this basis. We began "with the proposition that in any given instance the presumption must be that a party exercising a peremptory challenge is doing so on a constitutionally permissible ground. . . . [¶] Yet it is only a presumption, and must be rebuttable if the foregoing constitutional right is not to be nullified even by honest zeal. The issue is what showing is necessary to rebut it. We must define a burden of proof which a party may reasonably be expected to sustain in meritorious cases, but which he cannot abuse to the detriment of the peremptory challenge system." (*Id.* at p. 278.)

We adopted the following procedure: "If a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he must raise the point in timely fashion and make a prima facie case of such discrimination to the satisfaction of the court. First, . . . he should make as complete a record of the circumstances as is feasible. Second, he must establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule. Third, from all the circumstances of the case he must show a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias." (*Wheeler*, *supra*, 22 Cal.3d at p. 280, fn. omitted.) We discussed types of evidence the objector may present to make this showing. "[T]he party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic—their membership in the group—and that in all other respects they are as heterogeneous as the community as a whole. Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all. Lastly, . . . the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule; yet if he is, and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court's attention." (*Id.* at pp. 280-281, fn. omitted.)

We then discussed what the court must do. "Upon presentation of this and similar evidence—in the absence, of course, of the jury—the court must

determine whether a reasonable inference arises that peremptory challenges are being used on the ground of group bias alone. We recognize that such a ruling 'requires trial judges to make difficult and often close judgments. They are in a good position to make such determinations, however, on the basis of their knowledge of local conditions and of local prosecutors.' [Citation.] They are also well situated to bring to bear on this question their powers of observation, their understanding of trial techniques, and their broad judicial experience. We are confident of their ability to distinguish a true case of group discrimination by peremptory challenges from a spurious claim interposed simply for purposes of harassment or delay.

"If the court finds that a prima facie case has been made, the burden shifts to the other party to show if he can that the peremptory challenges in question were not predicated on group bias alone. The showing need not rise to the level of a challenge for cause. But to sustain his burden of justification, the allegedly offending party must satisfy the court that he exercised such peremptories on grounds that were reasonably relevant to the particular case on trial or its parties or witnesses—i.e., for reasons of specific bias as defined herein. He, too, may support his showing by reference to the totality of the circumstances: for example, it will be relevant if he can demonstrate that in the course of this same voir dire he also challenged similarly situated members of the majority group on identical or comparable grounds. And again we rely on the good judgment of the trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination.

"If the court finds that the burden of justification is not sustained as to any of the questioned peremptory challenges, the presumption of their validity is rebutted." (*Wheeler*, *supra*, 22 Cal.3d at pp. 281-282, fn. omitted.)

2. *Batson*

In *Batson*, the United States Supreme Court held that principles of equal protection "forbid discrimination on account of race in selection of the petit jury." (*Batson*, *supra*, 476 U.S. at p. 88 [106 S.Ct. at p. 1718].) It, too, discussed what to do when one party objects to the other party's peremptory challenges. "As in any equal protection case, the 'burden is, of course,' on the defendant who alleges discriminatory selection of the venire 'to prove the existence of purposeful discrimination.' [Citations.] In deciding if the defendant has carried his burden of persuasion, a court must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.' [Citation.] Circumstantial evidence of invidious intent may be proof of disproportionate impact. [Citation.] We have observed that

under some circumstances proof of discriminatory impact 'may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on non-racial grounds.' [Citation.] For example, 'total or seriously disproportionate exclusion of Negroes from jury venires,' [citation] 'is itself such an "unequal application of the law . . . as to show intentional discrimination," ' [citations]." (*Id.* at p. 93 [106 S.Ct. at p. 1721].)

A party alleging discriminatory use of peremptories "may make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. [Citation.] Once the defendant makes the requisite showing, the burden shifts to the State to explain adequately the racial exclusion." (*Batson*, *supra*, 476 U.S. at pp. 93-94 [106 S.Ct. at p. 1721].) In a footnote, the court stated that its "decisions concerning 'disparate treatment' under Title VII of the Civil Rights Act of 1964 have explained the operation of prima facie burden of proof rules. See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed.2d 668] (1973); *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248 [101 S.Ct. 1089, 67 L.Ed.2d 207] (1981); *United States Postal Service Board of Governors* v. *Aikens*, 460 U.S. 711 [103 S.Ct. 1478, 75 L.Ed.2d 403] (1983). The party alleging that he has been the victim of intentional discrimination carries the ultimate burden of persuasion. *Texas Dept. of Community Affairs* v. *Burdine*, *supra*, at 252-256 [101 S.Ct. at pp. 1093-1095]." (*Id.* at p. 94, fn. 18 [106 S.Ct. at pp. 1721-1722].)

The high court discussed in detail the "standards for assessing a prima facie case in the context of discriminatory selection of the venire . . . ." (*Batson*, *supra*, 476 U.S. at p. 96 [106 S.Ct. at p. 1723].) "[A] defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group [citation], and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race.[1] Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits

[1]Both *Wheeler*, *supra*, 22 Cal.3d 258, and *Batson*, *supra*, 476 U.S. 79, like this case, involve criminal defendants claiming prosecutors impermissibly challenged members of the defendants' own ethnic group. Other cases have expanded the prohibition into other circumstances. (E.g., *J.E.B. v. Alabama ex rel. T.B.* (1994) 511 U.S. 127 [114 S.Ct. 1419, 128 L.Ed.2d 89] [gender]; *Georgia v. McCollum* (1992) 505 U.S. 42 [112 S.Ct. 2348, 120 L.Ed.2d 33] [defendant's exercise of peremptory challenges]; *Edmonson v. Leesville Concrete Co., Inc.* (1991) 500 U.S. 614 [111 S.Ct. 2077, 114 L.Ed.2d 660] [civil cases]; *Powers v. Ohio* (1991) 499 U.S. 400 [111 S.Ct. 1364, 113 L.Ed.2d 411] [defendant need not be member of the

'those to discriminate who are of a mind to discriminate.' [Citation.] Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empanelling of the petit jury . . . raises the necessary inference of purposeful discrimination.

"In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative. We have confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors." (*Batson*, *supra*, 476 U.S. at pp. 96-97 [106 S.Ct. at p. 1723].)

"Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. . . . The prosecutor . . . must articulate a neutral explanation related to the particular case to be tried. The trial court then will have the duty to determine if the defendant has established purposeful discrimination." (*Batson*, *supra*, 476 U.S. at pp. 97-98 [106 S.Ct. at p. 1723], fns. omitted.) In a footnote, the court also stated, "Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." (*Id.* at p. 98, fn. 21 [106 S.Ct. at p. 1724].)

In rejecting an argument that its holding could create serious administrative difficulties, the high court noted that "[i]n those States applying a version of the evidentiary standard we recognize today," courts have not experienced these difficulties. (*Batson*, *supra*, 476 U.S. at p. 99 [106 S.Ct. at p. 1724].) "For example, in *People v. Hall*, 35 Cal.3d 161, 672 P.2d 854 (1983), the California Supreme Court found that there was no evidence to show that procedures implementing its version of this standard, imposed five years earlier, were burdensome for trial judges." (*Id.* at p. 99, fn. 23 [106 S.Ct. at p. 1724].)

B. *The Necessary Showing for a Prima Facie Case*

(1c) *Wheeler* used both the terms "strong likelihood" and "reasonable inference" in describing the standard for a prima facie case. (*Wheeler*, *supra*,

excluded group]; *People v. Willis* (2002) 27 Cal.4th 811 [118 Cal.Rptr.2d 301, 43 P.3d 130] [defendant's exercise of peremptory challenges].) We need not consider these cases here.

22 Cal.3d at pp. 280, 281.) We believe it obvious that we considered the two terms to be different phrasing of the same standard. Language in a 1994 Court of Appeal decision, *People v. Bernard* (1994) 27 Cal.App.4th 458 [32 Cal.Rptr.2d 486], however, created some uncertainty. That case seemed to read the two terms as stating different standards, with "reasonable inference" being a lower standard than "strong likelihood." (*Id.* at p. 465.)

In *Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190, the court found that, at least after *People v. Bernard*, *supra*, 27 Cal.App.4th 458, "California state courts have applied a lower standard of scrutiny to peremptory strikes than the federal Constitution permits." (*Wade v. Terhune*, *supra*, at pp. 1196-1197.) The court noted also that, in recent years, this court has generally cited the "strong likelihood" language rather than the "reasonable inference" language. (*Id.* at p. 1197.) It believed that California courts give criminal defendants less protection than the United States Constitution requires "when they follow the *Wheeler* 'strong likelihood' test in determining whether a *prima facie* case has been established." (*Wade v. Terhune*, *supra*, at p. 1197.) In the court's view, "the *Wheeler* 'strong likelihood' test for a successful *prima facie* showing of bias is impermissibly stringent in comparison to the more generous *Batson* 'inference' test." (*Ibid.*) The court "therefore conclude[d] that California courts in following the 'strong likelihood' language of *Wheeler* are not applying the correct legal standard for a *prima facie* case under *Batson*." (*Ibid.*)

Shortly after *Wade v. Terhune*, *supra*, 202 F.3d 1190, and in response to it, we reiterated that "in California, a 'strong likelihood' means a 'reasonable inference,' " and disapproved *People v. Bernard*, *supra*, 27 Cal.App.4th 458, "to the extent it is inconsistent with *People v. Wheeler*, *supra*, 22 Cal.3d at pages 280-281." (*People v. Box*, *supra*, 23 Cal.4th at p. 1188, fn. 7.) However, the Ninth Circuit Court of Appeals held that this action did not cure the problem it perceived, at least for cases tried after *Bernard* and before *Box* in which trial courts were "following *Bernard*'s take on *Wheeler*." (*Cooperwood v. Cambra* (9th Cir. 2001) 245 F.3d 1042, 1047.) It said that "regardless" of our action in *People v. Box*, *supra*, at page 1188, footnote 7, "whenever state courts use the 'strong likelihood' standard, . . . these courts are applying a lower standard of scrutiny to peremptory strikes than the federal Constitution permits." (*Cooperwood v. Cambra*, *supra*, at p. 1047.) The majority below agreed and, accordingly, found that the trial court used an impermissible standard in determining whether defendant had established a prima facie case.

We reiterate what we implied in *Wheeler* and stated in *Box*: *Wheeler*'s terms "strong likelihood" and "reasonable inference" state the same standard. (*People v. Box*, *supra*, 23 Cal.4th at p. 1188, fn. 7; *Wheeler*, *supra*, 22

Cal.3d at pp. 280-281.) This has always been true, although we recognize that *People v. Bernard*, *supra*, 27 Cal.App.4th 458, may have created some uncertainty for a few years. But the important question for current purposes is not whether California courts have always viewed these terms as the same, but whether California's "strong likelihood" standard violates *Batson*. The *Wade v. Terhune* court and the majority below assumed that *Batson*'s inference test is "more generous" than *Wheeler*'s strong likelihood test without examining what the United State Supreme Court itself has said on the matter. (*Wade v. Terhune*, *supra*, 202 F.3d at p. 1197.) But to address this question, it is necessary to delineate exactly what the high court meant when it equated the necessary prima facie case with "an inference of discriminatory purpose." (*Batson*, *supra*, 476 U.S. at p. 94 [106 S.Ct. at p. 1721].) We believe the court has made its meaning clear.

The high court appears to have given other courts some flexibility in establishing the exact procedures to follow. "We decline, however, to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges." (*Batson*, *supra*, 476 U.S. at p. 99 [106 S.Ct. at pp. 1724-1725].) Thus, to some extent at least, *Batson* seems to have "left to lower courts the task of determining the type and quantum of proof necessary for a defendant to establish a prima facie case." (*State v. Duncan* (La. 2001) 802 So.2d 533, 545; see also Note, *Batson v. Kentucky and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection?* (1988) 74 Va. L.Rev. 811, 817 ["The Supreme Court has left the lower courts to grapple with the proper implementation of the *Batson* test. They must determine not only the quantum of proof necessary for a defendant to establish a prima facie case but also the types of explanations sufficient to rebut the defendant's claim"].) But whatever flexibility the high court has left state courts, the California standard is not less generous than the test the *Batson* court itself applies to establish a prima facie case.

In *Batson*, the court stated that its decisions under title VII of the Civil Rights Act of 1964 "explained the operation of prima facie burden of proof rules." (*Batson*, *supra*, 476 U.S. at p. 94, fn. 18 [106 S.Ct. at pp. 1721-1722].) The court has since repeatedly cited title VII cases as authoritative in the *Batson* context. (*Miller-El v. Cockrell* (2003) 537 U.S. 322, __ [123 S.Ct. 1029, 1041, 154 L.Ed.2d 931] (*Miller-El*); *Purkett v. Elem* (1995) 514 U.S. 765, 768 [115 S.Ct. 1769, 1771, 131 L.Ed.2d 834]; *Hernandez v. New York* (1991) 500 U.S. 352, 359 [111 S.Ct. 1859, 1866, 114 L.Ed.2d 395] (plur. opn.).) One of the decisions the court cited in *Batson*, *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed.2d 668], made clear that the plaintiff carried the initial burden of showing actions "from which one can infer, if such actions remain unexplained, that it is *more likely than not* that such actions were 'based on a discriminatory criterion illegal under the Act.'" (*Furnco Construction Corp. v. Waters* (1978) 438 U.S. 567, 576 [98 S.Ct. 2943, 2949, 57 L.Ed.2d 957], italics added.) Another of the decisions that *Batson* cited explained that the burden is not "onerous," but the party nevertheless had to prove "by the *preponderance of the evidence* a prima facie case of discrimination." (*Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248, 252-253 [101 S.Ct. 1089, 1093], italics added.) It stated that "the prima facie case 'raises an *inference* of discrimination only because we presume these acts, if otherwise unexplained, are *more likely than not* based on the consideration of impermissible factors.'" (*Id.* at p. 254 [101 S.Ct. at p. 1094], italics added.)

In one of the cases *Batson* cited, the high court recognized that the term "prima facie case" is, by itself, ambiguous, so it specifically stated what it meant in this context. "The phrase 'prima facie case' not only may denote the establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue. 9 J. Wigmore, Evidence § 2494 (3d ed. 1940). *McDonnell Douglas* should have made it apparent that in the Title VII context we use 'prima facie case' in the former sense." (*Texas Dept. of Community Affairs v. Burdine*, *supra*, 450 U.S. at p. 254, fn. 7 [101 S.Ct. at p. 1094].) Thus, when it refers to the objector establishing "an inference of discriminatory purpose" (*Batson*, *supra*, 476 U.S. at p. 94 [106 S.Ct. at p. 1721]), the high court means establishing a legally mandatory rebuttable presumption, and *not* merely presenting enough evidence to *permit the inference*.

Wigmore, in turn, goes into greater detail. He explains that the term "'prima facie case' is used in two senses . . . ." (9 Wigmore, Evidence (Chadbourne rev. ed. 1981) § 2494, p. 378.)[2] The sense the high court does *not* mean in this context created the lower of the two burdens—merely the "duty of producing *some evidence*" sufficient to allow a matter to go to the jury. (Wigmore, at p. 379, italics added.) Wigmore also describes the sense in which the high court uses the term. "[T]he term 'prima facie' is sometimes used as *equivalent to the notion of a presumption*, even in the strict sense of a ruling of the judge putting upon the opponent the duty of producing evidence." (*Ibid.*) Thus, it applies "where the proponent, having the burden of proving the issue (i.e., the risk of nonpersuasion of the jury), has not only removed by sufficient evidence the duty of producing evidence to get past the judge or the jury, but has gone further, and, either by means

[2]We are quoting the most recent revision of this work rather than the earlier version the high court cited in *Texas Dept. of Community Affairs v. Burdine*, *supra*, 450 U.S. 248; the two versions are identical as relevant.

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of a presumption or by a general mass of *strong evidence*, has entitled himself to a ruling that the opponent should fail if he does nothing more in the way of producing evidence." (*Ibid.*, italics added.)

Thus, *Batson* permits a court to require the objector to present, not merely "some evidence" permitting the inference, but "strong evidence" that makes discriminatory intent more likely than not if the challenges are not explained. Nothing suggests the high court has since modified *Batson*'s approach. Indeed, in its most recent decision on this subject, it said it was considering "the three-step framework mandated by *Batson* and reaffirmed in our later precedents" and, in describing the prima facie case requirement, echoed *Batson*'s "inference" language. (*Miller-El*, *supra*, 537 U.S. at pp. ___, ___ [123 S.Ct. at pp. 1040, 1045] ["the inference of discrimination to support a prima facie case"].)

Other states, although not all,[3] have reached similar conclusions regarding *Batson*'s meaning. Citing *Texas Dept. of Community Affairs v. Burdine*, *supra*, 450 U.S. at pages 252-253 [101 S.Ct. at page 1093], the Connecticut Supreme Court has said that under the first stage of the *Batson* inquiry, the "defendant must establish by a preponderance of the evidence a prima facie case of purposeful discrimination." (*State v. Gonzalez* (1988) 206 Conn. 391 [538 A.2d 210, 213].) The Maryland Court of Appeals recognized that *Batson* cited title VII cases "for an explanation of the operation of prima facie burden of proof rules." (*Stanley v. State* (1988) 313 Md. 50 [542 A.2d 1267, 1271].) The Maryland Court of Appeals also concluded that "to make the *prima facie* showing *Batson* requires, the moving party must 'prove by a preponderance of the evidence that the peremptory challenges were exercised in a way that shifts the burden of production to the State and requires it to respond to the rebuttable presumption of purposeful discrimination that arises under certain circumstances.' " (*Mejia v. State* (1992) 328 Md. 522 [616 A.2d 356, 361], quoting *Stanley v. State*, *supra*, at p. 1277.)

Wheeler's term "strong likelihood" signals that it meant "prima facie case" in a similar sense.[4] This burden is not onerous (*Texas Dept. of Community Affairs v. Burdine*, *supra*, 450 U.S. at p. 253 [101 S.Ct. at pp. pp. 1093-1094]), but it is substantial. It is also appropriate to compel the objecting

[3]The Colorado Supreme Court, for example, has interpreted *Batson* as not requiring the defendant "to prove by a preponderance of the evidence that discrimination occurred. Rather, the defendant must present evidence sufficient to raise an inference that discrimination occurred." (*Valdez v. People* (Colo. 1998) 966 P.2d 587, 590.) But the court did not examine what the high court itself has stated on the question.

[4]The dissent claims Evidence Code section 600, subdivision (b), which defines an inference as "a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action," somehow supports its position. (Dis. opn., *post*, at p. 1334.) The *Wheeler* court certainly understood that an inference is a logical deduction of fact. But the question here, which Evidence Code section 600 does not address, is how strong the inference must be. In a criminal trial, for example, an inference of guilt must be beyond a reasonable doubt. The dissent's own unique proposed test—"a substantial danger that the prosecutor's challenges were based on improper grounds"—is not found in Evidence Code section 600. (Dis. opn., *post*, at p. 1334.)

party to meet this burden before it can force the other party to explain the reasons for its peremptory challenges. The burden is one "which a party may reasonably be expected to sustain in meritorious cases, but which he cannot abuse to the detriment of the peremptory challenge system." (*Wheeler*, *supra*, 22 Cal.3d at p. 278.) The high court itself has noted that the *Batson* analysis "permits prompt rulings on objections to peremptory challenges without substantial disruption of the jury selection process." (*Hernandez v. New York*, *supra*, 500 U.S. at p. 358 [111 S.Ct. at pp. 1865-1866] (plur. opn.); see also *id.* at p. 374 [111 S.Ct. at p. 1874] (conc. opn. of O'Connor, J.) [warning against "unacceptable delays in the trial process" that would be "antithetical to the nature and purpose of the peremptory challenge"].)

The term "strong likelihood" has never set a higher standard than *Batson* permits. *Wheeler* "define[d] a burden of proof . . . ." (*Wheeler*, *supra*, 22 Cal.3d at p. 278.) "Except as otherwise provided by law," the default burden of proof in California is "proof by a preponderance of the evidence." (Evid. Code, § 115; see *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 546 [110 Cal.Rptr.2d 412, 28 P.3d 151].) Here, no other law has provided for a different standard. This court has never suggested that *Wheeler* imposed the burden of either clear and convincing proof or proof beyond a reasonable doubt, the two higher burdens of proof that exist in this state. (Evid. Code, § 115.) Moreover, the unqualified word "likelihood" would have been insufficient to signal the correct standard. That word, or the equivalent "likely," has a range of meanings, including some lower than more likely than not. (See *People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888, 917, 922 [119 Cal.Rptr.2d 1, 44 P.3d 949] [interpreting a statute using the word "likely" as not requiring a showing of a "better than even" chance].) Thus, qualifying "likelihood" with "strong" is appropriate and consistent with *Batson*.

Although not dispositive, the *Batson* court itself considered *Wheeler*'s procedures comparable to its own. It did not specifically cite *Wheeler*'s "strong likelihood" language, but it referred to this court's "procedures implementing its version of [*Batson*'s evidentiary] standard" without suggesting there was anything wrong with those procedures. (*Batson*, *supra*, 476 U.S. at p. 99, fn. 23 [106 S.Ct. at p. 1724].)

We disagree that the "strong likelihood" standard became too high in the interval between *People v. Bernard*, *supra*, 27 Cal.App.4th 458, and *People*

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v. Box, *supra*, 23 Cal.4th 1153. *Bernard* did not somehow transform "strong likelihood" from a correct to an incorrect standard. Like the court in *Wade v. Terhune*, *supra*, 202 F.3d 1190, and the majority below, the *Bernard* court did not examine what *Wheeler* or the high court meant by the word "inference" in this context. It misunderstood that meaning. The *Bernard* court said the presumption that peremptory challenges are being used properly should be rebuttable "only by a strong showing, not a mere inference," because a different standard "might easily transform removal of each and every prospective juror belonging to a cognizable group into a *Wheeler* hearing." (*People v. Bernard*, *supra*, at p. 465.) It also referred to "a reduction of the prima facie standard to a 'reasonable inference' test." (*Ibid.*) This use of the word "inference" was akin to Wigmore's lower sense of evidence merely permitting one to draw an inference, not the higher sense of *Batson* and *Wheeler*. Thus, to the extent *Bernard* erred, it was in assuming "inference" was lower than it really is in this context, not in raising "strong likelihood" to an impermissibly high standard.

Accordingly, *Wheeler*'s standard for establishing a prima facie case of discriminatory use of peremptory challenges is, and always has been, compatible with *Batson*. It merely means that to state a prima facie case, the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias. The trial court here properly cited the *Wheeler* standard in determining whether defendant had established a prima facie case.

C. *Appellate Use of Comparative Juror Analysis*

The majority below compared the answers of challenged jurors with those of nonchallenged jurors, a comparison not done at trial, in order to overturn the trial court's finding of no prima facie case. Defendant argues that doing so was proper and that our cases, which he interprets as prohibiting all comparative juror analysis, violate *Batson*, *supra*, 476 U.S. 79. Defendant misunderstands our jurisprudence. **(2c)** We have observed that engaging in comparative juror analysis *for the first time on appeal* is unreliable and inconsistent with the deference reviewing courts necessarily give to trial courts, but we have never prohibited trial courts from doing so or the party objecting to the challenges from relying on such analysis in seeking to make a prima facie case.

In *People v. Johnson*, *supra*, 47 Cal.3d 1194, we revisited *People v. Trevino* (1985) 39 Cal.3d 667 [217 Cal.Rptr. 652, 704 P.2d 719], which had engaged in comparative juror analysis for the first time on appeal. We found that *Trevino* had "placed undue emphasis on comparisons of the stated

reasons for the challenged excusals with similar characteristics of nonmembers of the group who were not challenged by the prosecutor. First, we note . . . that the comparison is one-sided since it ignores the characteristics of the other . . . jurors against whom the prosecutor also exercised peremptory challenges. [Citation.] Moreover, we fail to see how a trial judge can reasonably be expected to make such detailed comparisons mid-trial." (*People v. Johnson*, *supra*, at p. 1220.)

We explained that "use of a comparison analysis to evaluate the bona fides of the prosecutor's stated reasons for peremptory challenges does not properly take into account the variety of factors and considerations that go into a lawyer's decision to select certain jurors while challenging others that appear to be similar. Trial lawyers recognize that it is a combination of factors rather than any single one which often leads to the exercise of a peremptory challenge. In addition, the particular combination or mix of jurors which a lawyer seeks may, and often does, change as certain jurors are removed or seated in the jury box." (*People v. Johnson*, *supra*, 47 Cal.3d at p. 1220.)[5] We found it apparent "that the very dynamics of the jury selection process make it difficult, if not impossible, on a cold record, to evaluate or compare the peremptory challenge of one juror with the retention of another juror which on paper appears to be substantially similar. [Attempting] to make such an analysis of the prosecutor's use of his peremptory challenges is highly speculative and less reliable than the determination made by the trial judge who witnessed the process by which the defendant's jury was selected. It is therefore with good reason that we and the United States Supreme Court give great deference to the trial court's determination that the use of peremptory challenges was not for an improper or class bias purpose." (*Id.* at p. 1221.)

Accordingly, we disapproved *People v. Trevino*, *supra*, 39 Cal.3d 667, to the extent it was inconsistent with these views and returned to a "standard of truly giving great deference to the trial court in distinguishing bona fide reasons from sham excuses." (*People v. Johnson*, *supra*, 47 Cal.3d at p. 1221.) Like the high court, we stated we "'may assume that trial judges, in supervising *voir dire* in light of our decision today, will be alert to identify a prima facie case of purposeful discrimination.'" (*Ibid.*, quoting *Batson*, *supra*, 476 U.S. at p. 99, fn. 22 [106 S.Ct. at p. 1724].)

Since then, we have not engaged in comparative juror analysis for the first time on appeal. **(4)** "If the trial court makes a 'sincere and reasoned

[5]This case presents an example. The district attorney accepted the jury four times with C.T. on it before he peremptorily challenged her, apparently due to a change in the jury's composition.

effort' to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. In such circumstances, an appellate court will not reassess good faith by conducting its own comparative juror analysis. Such an approach would undermine the trial court's credibility determinations and would discount ' "the variety of [subjective] factors and considerations," ' including 'prospective jurors' body language or manner of answering questions,' which legitimately inform a trial lawyer's decision to exercise peremptory challenges." (*People v. Montiel*, *supra*, 5 Cal.4th at p. 909.)

Defendant argues that *any* rule against comparative juror analysis is invalid but, as a backup position, he also argues that, at least, the rule is limited to the *second* stage of the trial court's duty—judging the validity of the reasons for the exercising of challenges after it has found a prima facie case—and does not apply to the *first* stage—judging whether the objector has established a prima facie case to begin with. We disagree. Although some of our decisions, including *People v. Johnson*, *supra*, 47 Cal.3d 1194, did involve the second stage, others reviewed trial court findings of no prima facie case. (E.g., *People v. Box*, *supra*, 23 Cal.4th at pp. 1188, 1190; *People v. Turner* (1994) 8 Cal.4th 137, 167, 169-170 [32 Cal.Rptr.2d 762, 878 P.2d 521].) Differences do exist in the two procedural postures. At the first stage, the party making the challenges is not asked to explain them, so the trial court does not have to judge that party's credibility. But the concerns about the inability of a reviewing court to judge the dynamics of jury selection *on a cold record* apply to both stages. A comparison of the jurors' answers is unreliable when divorced from the context of the trial. A trial court, but not a reviewing court, is able to place the answers into context and draw meaning from *all* the circumstances, including matters not discernable from the record.

Even the Ninth Circuit Court of Appeals, which has a different practice in this regard than we (*Burks v. Borg* (9th Cir. 1994) 27 F.3d 1424, 1427), reviews a trial court's finding of no prima facie case deferentially. (*Tolbert v. Page* (9th Cir. 1999) 182 F.3d 677 (in bank).) Its reasoning for giving such deference echoes ours both in giving similar deference and in not engaging in comparative juror analysis for the first time on appeal. "[T]he trial court is better positioned to decide the *Batson* prima facie issue, which involves a ' "factual inquiry" that "takes into account all the possible explanatory factors" in the particular case.' [Citation.] Whether or not 'all the relevant circumstances' 'raise an inference' of discrimination will depend on factors such as the attitude and behavior of the challenging attorney and the prospective jurors manifested during voir dire. As a purely practical matter, the trial judge's unique perspective of voir dire enables the judge to have

first-hand knowledge and observation of critical events. [Citation.] The trial judge personally witnesses the totality of circumstances that comprises the 'factual inquiry,' including the jurors' demeanor and tone of voice as they answer questions and counsel's demeanor and tone of voice in posing the questions. [Citation.] The trial judge is able to observe a juror's attention span, alertness, and interest in the proceedings and thus will have a sense of whether the prosecutor's challenge can be readily explained by a legitimate reason. . . . In addition, the trial court is 'experienced in supervising voir dire.' [Citations.]

"The appellate court, on the other hand, must judge the existence of a prima facie case from a cold record. An appellate court can read a transcript of the voir dire, but it is not privy to the unspoken atmosphere of the trial court—the nuance, demeanor, body language, expression and gestures of the various players. [Citation.] . . . [T]he prima facie inquiry is so fact-intensive and so dependent on first-hand observations made in open court that the trial court is better positioned to decide the issue . . . ." (*Tolbert v. Page*, *supra*, 182 F.3d at pp. 683-684.)

"While [*People v. Johnson*, *supra*, 47 Cal.3d 1194] limits the scope of appellate review of a trial court's *Batson* determination, it does not preclude comparative analysis by the trial court." (*Burks v. Borg*, *supra*, 27 F.3d at p. 1428.) We do not, and cannot reasonably, require trial judges to perform such analysis *itself* (*People v. Johnson*, *supra*, 47 Cal.3d at p. 1220), but the objecting party may make the argument for the trial court to evaluate. For example, in *People v. Crittenden* (1994) 9 Cal.4th 83 [36 Cal.Rptr.2d 474, 885 P.2d 887], the defendant presented at trial "evidence, compiled from the biographical information of 50 prospective jurors," and compared those jurors' answers in support of his argument that the prosecutor improperly challenged a particular juror. (*Id.* at p. 116.) As the reviewing court, we considered this and other evidence and concluded that "[i]n light of all the relevant circumstances, the trial court properly could find that defendant had not made a prima facie showing . . . ." (*Id.* at p. 119.)

In support of his position, defendant cites *Miller-El*, *supra*, 537 U.S. 322 [123 S.Ct. 1029], but that case merely provides another example of a reviewing court considering evidence of comparative juror analysis after it had been presented to the trial court. *Miller-El* was tried before the decision in *Batson*, *supra*, 476 U.S. 79. At trial, the defendant had objected that the prosecution was using peremptory challenges discriminatorily, but the *Batson* procedures had not yet been established. *Batson* was decided while the case was on appeal. The Texas Court of Criminal Appeals remanded the case to the original trial court for new findings in light of *Batson*. Defendant

presented to the trial court several types of evidence supporting a prima facie case. Before the original trial, he had presented "evidence relating to a pattern and practice of race discrimination in the *voir dire*." (*Miller-El*, *supra*, 537 U.S. at p. __ [123 S.Ct. at p. 1036].) Then, two years later, "he presented, to the same state [trial] court, evidence that directly related to the conduct of the prosecutors in his case." (*Ibid.*) Some of the latter evidence was comparative juror analysis of the type offered for the first time on appeal here. (*Id.* at p. __ [123 S.Ct. at p. 1043].) After the state courts denied relief, the federal district court denied relief on federal habeas corpus, and the appellate court denied a certificate of appealability which, under federal law, prevented the defendant from appealing the matter. The United States Supreme Court reversed the denial of a certificate of appealability. It did not directly address the *Batson* question, but rather determined that the issue was "debatable" and, under federal habeas corpus law, the appellate court should have considered it on the merits. (*Id.* at p. __ [123 S.Ct. at p. 1045].) Its discussion made clear that the comparative juror analysis presented to the trial court was among the evidence reviewing courts should consider. (*Id.* at p. __ [123 S.Ct. at p. 1043].) This conclusion is consistent with our practice. Nothing in *Miller-El*, however, suggests that a reviewing court must engage in comparative juror analysis *for the first time on appeal*.

Both *Wheeler* and *Batson* place the burden of making the prima facie showing on the objecting party. (*Batson*, *supra*, 476 U.S. at p. 96 ["the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race"]; *Wheeler*, *supra*, 22 Cal.3d at p. 280 [the objecting party must "make a prima facie case of . . . discrimination to the satisfaction of the court," should "make as complete a record of the circumstances as is feasible," and "from all the circumstances of the case . . . must show a strong likelihood" of improper challenges].) Neither decision requires a reviewing court to search the record itself for evidence that might have supplemented the objector's showing. Nor must the trial court consider arguments not made and evidence not presented, although nothing prevents it from doing so in judging all of the circumstances.

Defendant argues that our statement that we cannot expect a trial judge "to make such detailed comparisons mid-trial" (*People v. Johnson*, *supra*, 47 Cal.3d at p. 1220) "overlooks the trial lawyers' role." He argues that the attorneys can make these arguments to assist the trial court "because, under the adversary system, the job of marshaling the relevant evidence is performed in the first instance by the lawyers. Accordingly, comparative juror analysis can easily and realistically be employed by state trial judges, too." We agree. Indeed, as noted, *People v. Crittenden*, *supra*, 9 Cal.4th 83,

provides an example of the attorneys doing just this for the trial court's consideration. But defendant did not make this kind of showing at trial, and we cannot expect the trial court to do so itself.

We have also said that comparative juror analysis is "largely beside the point" because of the legitimate subjective concerns that go into selecting a jury. (*People v. Arias* (1996) 13 Cal.4th 92, 136, fn. 16 [51 Cal.Rptr.2d 770, 913 P.2d 980].) But it is not *irrelevant*. Although such analysis, by itself, proves little, properly presented to the trial court, it can be among the "all relevant circumstances" (*Batson*, *supra*, 476 U.S. at pp. 96-97 [106 S.Ct. at p. 1723]) or "all the circumstances of the case" (*Wheeler*, *supra*, 22 Cal.3d at p. 280) that the trial court must consider in making its determination.

In *People v. Howard* (1992) 1 Cal.4th 1132 [5 Cal.Rptr.2d 268, 824 P.2d 1315], we did not "limit[] our review . . . solely to counsel's presentation at the time of the motion. This is because other circumstances might support the finding of a prima facie case even though a defendant's showing [was itself inadequate]. Nor should the trial court blind itself to everything except defense counsel's presentation. Indeed, we have emphasized that such rulings require trial judges to consider 'all the circumstances of the case' [citation] and call upon judges' ' "powers of observation, their understanding of trial techniques, and their broad judicial experience." ' [Citations.] The trial judge in this case, for example, obviously knew that defendant belonged to the same group as the challenged jurors and that his victims did not. Clearly these are relevant factors [citation], and they were apparent to the trial court even though defendant did not mention them during his *Wheeler* motion." (*Id.* at p. 1155.) "For these reasons," we said, "when a trial court denies a *Wheeler* motion without finding a prima facie case of group bias the reviewing court considers the entire record of voir dire." (*Ibid.*) Certainly, the trial court should consider obvious matters, and it can consider any other circumstances it finds relevant in the particular case. But, midtrial, we cannot expect, and do not demand, trial courts to engage sua sponte in the sort of comparative juror analysis that appellate lawyers and courts can do after scouring the often lengthy appellate record during the appeal. And, given the inability of reviewing courts to reliably conduct such analysis on a cold record, those courts are not required to do so for the first time on appeal.

Defendant cites a number of federal cases that engage in comparative juror analysis in a different way than we do. The Ninth Circuit, for example, has stated that its practice is different than ours. (*Burks v. Borg*, *supra*, 27

F.3d at p. 1427.)[6] Other courts may certainly adopt different procedures than we. But we do not believe that comparative juror analysis for the first time on appeal is constitutionally compelled. The *Batson* court itself stated that in deciding whether the defendant has made the necessary showing, "the *trial court* should consider all relevant circumstances." (*Batson, supra*, 476 U.S. at pp. 96-97 [106 S.Ct. at p. 1723], italics added.) It relies heavily on "trial judges, experienced in supervising *voir dire*," to make this determination. (*Id.* at p. 97 [106 S.Ct. at p. 1723].) "During jury selection, the entire *res gestae* take place in front of the trial judge. Because the judge has before him the entire venire, he is well situated to detect whether a challenge to the seating of one juror is part of a 'pattern' of singling out members of a single race for peremptory challenges." (*United States v. Armstrong* (1996) 517 U.S. 456, 467-468 [116 S.Ct. 1480, 1488, 134 L.Ed.2d 687].) The "entire *res gestae*" do not take place in front of an appellate court.

The *Batson* court rejected the argument that its holding would "create serious administrative difficulties" and noted that California had not found its own version to be "burdensome for trial judges." (*Batson, supra*, 476 U.S. at p. 99 & fn. 23 [106 S.Ct. at p. 1724], citing *People v. Hall* (1983) 35 Cal.3d 161 [197 Cal.Rptr. 71, 672 P.2d 854].) However, requiring trial courts to engage in comparative juror analysis sua sponte in the middle of the trial *would* be burdensome. Moreover, permitting appellate courts to overturn trial court decisions based on their own comparative analysis of a cold record, divorced from the nuances of trial not apparent from the record, is inconsistent with the deference reviewing courts necessarily give trial courts. We see nothing in the high court decisions requiring us to defer less to trial courts or engage in our own comparative juror analysis for the first time on appeal.[7]

(2d) Accordingly, we maintain our long-standing practice. When the objecting party presents comparative juror analysis to the trial court, the

[6]That court also noted that the United States Supreme Court "has not yet ruled on the role of comparative analysis on appellate review, so no one is quite sure whether our circuit or the California Supreme Court is right." (*Burks v. Borg, supra*, 27 F.3d at p. 1427.)

[7]The dissent claims that our reliance on *People v. Johnson, supra*, 47 Cal.3d 1194, is misplaced because *Johnson* barred using comparative juror analysis on appeal *whether or not the parties raised that approach in the trial court.* (Dis. opn., *post*, at pp. 1330-1332.) Contrary to the dissent, *Johnson*'s underlying rationale was predicated on the fact that the defendant made no comparative juror argument *at trial*. We reasoned that: (1) a trial judge could not reasonably be expected to make detailed comparisons of jurors midtrial *sua sponte*, and (2) *without explanation at trial* from the party who exercised the challenge, comparative juror analysis could not accurately take into account the various factors that influence the decision to make a peremptory challenge. (*Johnson, supra*, at pp. 1220-1221.) We then concluded, "It should be apparent, *therefore*, that the very dynamics of the jury selection process make it difficult, if not impossible, *on a cold record*, to evaluate or compare the peremptory challenge of one juror with the retention of another juror which *on paper* appears to be substantially similar." (*Id.* at p. 1221, italics added.) In other words, the trial and appellate courts are in no

reviewing court must consider that evidence, along with everything else of relevance, in reviewing, deferentially, the trial court's ruling. When such an analysis was not presented at trial, a reviewing court should not attempt its own comparative juror analysis for the first time on appeal, especially when, as here, the record supports the trial court's finding of no prima facie case. While we decline to prohibit the practice outright, we are hard pressed to envision a scenario where comparative juror analysis for the first time on appeal would be fruitful or appropriate.

D. *The Trial Court's Ruling in This Case*

We have already alluded to the standard of appellate review of a trial court's finding of no prima facie case. Because these rulings call upon trial judges' personal observations, we review them with considerable deference. (*People v. Jones* (1998) 17 Cal.4th 279, 294 [70 Cal.Rptr.2d 793, 949 P.2d 890].) Of course, "deference is not abdication . . . ." (*People v. Scott* (1997) 15 Cal.4th 1188, 1212 [65 Cal.Rptr.2d 240, 939 P.2d 354]; see also *Miller-El, supra*, 537 U.S. at p. __ [123 S.Ct. at p. 1041] ["deference does not imply abandonment or abdication of judicial review"].) Accordingly, we review the entire record for evidence supporting the trial court's ruling. But if the record suggests grounds on which the prosecutor might reasonably have challenged the jurors, we affirm that ruling. (*People v. Howard, supra*, 1 Cal.4th at p. 1155.)

(5) The record here suggests grounds for the prosecutor to have reasonably challenged these jurors. The trial judge, "who had performed much of and observed the remainder of the voir dire, [and thus] was in the best position to determine under 'all the relevant circumstances' of the case" whether a prima facie showing existed (*People v. Box, supra*, 23 Cal.4th at p. 1189), mentioned reasons as to two of the jurors. The court noted that these reasons did not warrant a challenge for cause, but peremptory challenges need not be based on grounds for a challenge for cause. (*People v. Jones, supra*, 17 Cal.4th at p. 294.) So far as we can review the court's reasons on

position to engage in comparative juror analysis on their own, without the issue first being raised by the parties at trial. Our approach is entirely consistent with *Johnson*.

Contrary to the dissent, *People v. Johnson, supra*, 47 Cal.3d 1194, is also entirely consistent with *Miller-El*. In that case, the high court had "no difficulty in using comparative juror analysis" (dis. opn., *post*, at p. 1332) because it was simply reviewing the state court record, i.e., comparative juror evidence that the defendant had first presented to the trial judge in support of his *Batson* motion. (*Miller-El, supra*, 537 U.S. at pp. __, __ [123 S.Ct. at pp. 1035-1036, 1043-1045].) Evidently, none of the parties disputed that a comparative juror analysis is a proper or necessary procedure in deciding a *Batson* claim. Thus, that issue was not before the high court, which only addressed whether the underlying evidence before the state trial court supported the issuance of a certificate of appealability. (*Id.* at pp. __-__ [123 S.Ct. at pp. 1042-1045].)

the cold record, the record supports them. Defendant has a different view of the significance of these jurors' answers and courtroom statements, but we see no basis on which to overturn the trial court's determinations.

As the majority below and defendant point out, the trial court did not specifically discuss the third of the challenged jurors, C.T., who was actually the first one challenged. But at trial, defendant did not argue that no reason existed to challenge that juror. His first *Wheeler* motion was "specifically" directed towards the challenge of S.E. His second *Wheeler* motion also never referred to C.T. The court acted reasonably in discussing the arguments defendant made, not arguments he did not make. Moreover, as the dissent below noted, the record discloses race-neutral grounds for challenging C.T.: "(1) she was childless (this case involved the death and alleged abuse of a minor), (2) the police had made no arrest after the robbery of her home five or six years ago, and (3) she omitted to answer the two questions in the questionnaire dealing with her opinions of prosecuting and defending attorneys." (Fn. omitted.) As that dissent also noted, "lack of family may have appeared relevant to the prosecutor in a case involving child abuse and reasonably could be deemed to constitute a non-discriminatory basis for striking the venireman." (*U.S. v. Lewis* (9th Cir. 1988) 837 F.2d 415, 417.)

Defendant stresses that the district attorney used three of his 12 peremptory challenges to remove all three African-American prospective jurors, and this case involves an African-American defendant charged with killing "his White girlfriend's child." These circumstances are obviously highly relevant to whether a prima facie case existed. (*Wheeler*, *supra*, 22 Cal.3d at pp. 280-281.) They definitely warranted the trial court's careful scrutiny, which that court gave. The court considered the question close but found no prima facie case under all the circumstances. We will not second-guess its determination by attempting a comparative juror analysis for the first time on appeal.

An additional note about the circumstances of this case is in order. Viewing these circumstances in isolation, it certainly looks suspicious that all three African-American prospective jurors were removed from the jury. But viewing a case like this in isolation is all a reviewing court *can* do. When this issue comes before a reviewing court, the circumstances often will be akin to those here. A reviewing court does not review the ordinary, nonsuspicious cases of jury selection. (Nor does it review those cases in which the trial court *grants* a *Wheeler* motion, so it also never sees those rulings.) A reviewing court does not see the big picture; it cannot place a case like this into perspective. It cannot know whether a case like this is typical, thus suggesting a real problem, or merely a statistical aberration of

the type that will inevitably occur occasionally given such a small sampling. The trial court, however, is capable of seeing the big picture. It can place a specific trial in a county into perspective. Trial judges "'are in a good position to make such determinations . . . on the basis of their knowledge of local conditions and of local prosecutors.'" (*Wheeler*, *supra*, 22 Cal.3d at p. 281.) This is another reason we must, and can, rely on trial courts to determine, from all the relevant circumstances, whether a prima facie case of discriminatory use of peremptory challenges exists.

Defendant cites *Miller-El*, *supra*, 537 U.S. __ [123 S.Ct. 1029], in support of his argument that a prima facie case existed here. In *Miller-El*, the prosecution conceded in the high court that the defendant had established a prima facie case. (*Id.* at p. __ [123 S.Ct. at p. 1040].) But the evidence the defendant presented in that case was far stronger than here. The defendant there presented several types of evidence to the original trial court: (1) the statistical disparity of peremptory challenges of African-Americans (10 of 11 were challenged) compared to others (4 of 31 were challenged); (2) a comparison of the manner in which the prosecution questioned African-Americans and others, which suggested "that the manner in which members of the venire were questioned varied by race" (*id.* at p. __ [123 S.Ct. at p. 1037]); (3) a comparison of the answers of prospective jurors akin to the comparative juror analysis defendant attempts here to present for the first time on appeal (*id.* at p. __ [123 S.Ct. at p. 1043]); (4) the prosecution's use of a procedural practice unknown in California called "jury shuffling," which can be used to manipulate which prospective jurors are actually called;[8] and (5) evidence that the district attorney's office historically had a pattern and practice of racial discrimination in voir dire.

Here, defendant's showing in the trial court consisted primarily of the statistical disparity of peremptory challenges between African-Americans and others. Regarding this type of evidence, *Miller-El* stated that "the statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors. The prosecutors used their peremptory strikes to exclude 91% of the eligible African-American venire members, and only one served on petitioner's jury. In total, 10 of the prosecutors' 14 peremptory strikes were used against African-Americans. Happenstance is unlikely to produce this disparity." (*Miller-El*, *supra*, 537 U.S. at p. __ [123 S.Ct. at p. 1042].) Here, the number of strikes is smaller, and thus perhaps more explainable by happenstance: three of the

[8] "On at least two occasions the prosecution requested shuffles when there were a predominate number of African-Americans in the front of the panel," with the result that the African-Americans were spread out more randomly and thus less likely to be called. (*Miller-El*, *supra*, 537 U.S. at p. __ [123 S.Ct. at p. 1038].)

prosecutors' 12 peremptory strikes were used against African-Americans. In one respect, however, the percentages are even worse: the prosecutor challenged all three (100 percent) of the eligible African-Americans. But the high court did not cite the statistical evidence to show that it alone necessarily established a prima facie case, but only to support the overall conclusion that the merits of the habeas corpus petition were sufficiently debatable that the federal appellate court should have permitted an appeal. Here, both the trial court and this court have considered the issue on the merits. The statistics here are indeed troubling and, as the trial court stated, the question was close, but, for the reasons explained, we see no basis to overturn the trial court's carefully considered ruling.

(6) Defendant and the dissent (dis. opn., *post*, at p. 1340) also argue that the district attorney asked no questions of the African-American jurors he challenged. This circumstance may also be relevant. (*Wheeler*, *supra*, 22 Cal.3d at p. 281.) But this trial occurred in 1998, at a time the trial court had primary responsibility for conducting voir dire. (Code Civ. Proc., former § 223, as added by Prop. 115, approved by voters at Prim. Elec., June 5, 1990.) The district attorney asked no questions of any prospective juror, including the nine of other ethnic groups he also challenged. Thus, asking no questions was of little or no significance here.

III. CONCLUSION

California's reviewing courts are as ready as any to combat the pernicious effects of racial and other improper discrimination, in jury selection as in other matters. (E.g., *People v. Silva* (2001) 25 Cal.4th 345, 386 [106 Cal.Rptr.2d 93, 21 P.3d 769] [reversing a sentence of death because of error as to a single prospective juror].) But, like the United States Supreme Court, we necessarily, yet confidently, rely primarily on the good judgment of our trial courts to make the difficult determinations the procedures established in *Batson*, *supra*, 476 U.S. 79, and *Wheeler*, *supra*, 22 Cal.3d 258, require. The record in this case provides no reason to believe the trial court here failed to perform its duty properly.

Accordingly, we reverse the judgment of the Court of Appeal and remand the matter for further proceedings consistent with our opinion.

George, C. J., Baxter, J., Brown, J., and Moreno, J., concurred.

WERDEGAR, J., Concurring and Dissenting.—I concur in parts I., II.A. and II.C. of the majority opinion. With respect to the proper standard of proof for establishing a prima facie showing under *People v. Wheeler* (1978) 22 Cal.3d 258 [148 Cal.Rptr. 890, 583 P.2d 748] and *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69], I dissent and join part II of Justice Kennard's dissenting opinion.

KENNARD, J., Dissenting.—A peremptory challenge is presumed to have been based on valid grounds. If a defendant seeks to rebut this presumption, claiming that a prosecutor is improperly using peremptory challenges to remove prospective jurors solely because of group bias, the defendant must first establish a prima facie showing of discriminatory use.[1] (*Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69] (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 [148 Cal.Rptr. 890, 583 P.2d 748] (*Wheeler*).) If the trial court finds that a prima facie case has been established, it will ask the prosecutor to explain the basis for the peremptory challenges. If, after hearing the explanations, "the court finds that the burden of justification is not sustained as to any of the questioned peremptory challenges, the presumption of their validity is rebutted . . . and it must dismiss the jurors thus far selected." (*Wheeler*, *supra*, at p. 282.)

This case presents two issues concerning motions based on *Wheeler* and *Batson* objecting to prosecutorial peremptory challenges: (1) Should this court use comparative juror analysis—comparing the challenged jurors with others who were not challenged—in reviewing the trial court decision that defendant had failed to establish a prima facie showing that the prosecutor's challenges had a discriminatory purpose? (2) What must a defendant prove to make that initial prima facie showing of discriminatory purpose? On the first question, the majority relies on *People v. Johnson* (1989) 47 Cal.3d 1194 [255 Cal.Rptr. 569, 767 P.2d 1047], to hold that an appellate court ordinarily should not use comparative jury analysis in reviewing a trial court's denial of a *Wheeler-Batson* motion if the defendant has not raised that analysis in the trial court. I agree with that result, but would reach it by a different route. On the second question, the majority upholds the trial court's ruling finding no prima facie case on the ground that defendant failed to show that it is more likely than not that the peremptory challenges had a discriminatory purpose. I disagree with this standard, and would hold that a defendant need only prove facts that, if unexplained, permit a reasonable inference of discriminatory purpose. Even without using comparative juror analysis, the record here shows that defendant met that standard.

[1] I speak of a prosecutor's use of peremptory challenges and a defendant's objection because this case, like both *Wheeler* and *Batson*, arose in that factual setting. The principles of those decisions, however, also apply to peremptory challenges by a criminal defendant (*Georgia v. McCollum* (1992) 505 U.S. 42 [112 S.Ct. 2348, 120 L.Ed.2d 33]) and to challenges by parties to civil cases (*Edmonson v. Leesville Concrete Co., Inc.* (1991) 500 U.S. 614 [111 S.Ct. 2077, 114 L.Ed.2d 660]).

I

Comparative juror analysis involves comparing the challenged jurors to jurors who were not challenged to determine whether a proffered reason for a challenge is genuine or pretextual. For example, if the prosecution says it challenged juror A for not having a high school education, it would be of interest whether the prosecution challenged jurors B and C who also lack that education. If the prosecutor did, that would suggest that the proffered ground for challenge was genuine; if not, it would suggest there was probably some other reason for the challenge to juror A. Here, the trial court found defendant had not established a prima facie showing that the prosecutor's challenges had a discriminatory purpose because, in the court's view, the record showed neutral reasons why the prosecutor might have challenged the jurors in question. The defense could have used comparative juror analysis to question those reasons, but it did not do so. By failing to use comparative juror analysis in the trial court, the defense not only deprived the prosecution of the opportunity to explain the pattern of its preemptive challenges to the trial court, but it also deprived the trial court of the opportunity to evaluate that explanation in the context of the voir dire the court observed.

It is well settled that ordinarily an appellate court will not consider a theory not raised at trial. (See generally 1 Appeals & Writs in Criminal Cases (Cont.Ed.Bar 2d ed. 2000) § 1.165, pp. 164.2-165, and cases there cited; Erwin et al., Cal. Criminal Defense Practice (2002) § 101.35, pp. 108-112 and cases there cited.) "The general rule confining the parties on appeal to the theory advanced below is based on the rationale that the opposing party should not be required to defend for the first time on appeal against a new theory that 'contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial.' [Citation.]" (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742 [336 P.2d 534].) There are many examples. (See, e.g., *People v. Carrera* (1989) 49 Cal.3d 291, 324 [261 Cal.Rptr. 348, 777 P.2d 121] [appellant cannot raise new ground for claiming evidence was inadmissible]; *People v. Raley* (1992) 2 Cal.4th 870, 898 [8 Cal.Rptr.2d 678, 830 P.2d 712] [constitutional contention cannot be raised on appeal when issue was argued only on statutory grounds in the trial court].) Because defendant here failed to use comparative jury analysis in the trial court, this rule precludes defendant from arguing that theory on appeal.

The majority reaches the same conclusion, but instead of basing that conclusion on well-settled principles of appellate review, it relies on a

special California rule barring appellate courts from undertaking comparative juror analysis. This rule derives from *People v. Johnson*, *supra*, 47 Cal.3d 1194 (*Johnson*). Although the recitation of facts in *Johnson* suggests that the defendant did not use a comparative juror analysis in arguing his *Wheeler* motion at trial, the reasoning of this court did not rest on that fact. Instead, the *Johnson* majority gave three reasons for eschewing use of comparative jury analysis: (1) that a trial judge could not reasonably be expected to make detailed comparisons of jurors midtrial; (2) that comparative juror analysis does not properly take into account the variety of factors and considerations that influence the decision whom to challenge; and (3) that a comparative juror analysis by an appellate court on a cold record is less reliable than the decision of the trial court, which can observe the jurors and appreciate the setting of the challenges. (*Id.* at pp. 1220-1221.)

Because those reasons apply whether or not the defendant argues comparative juror analysis in the trial court, the more reasonable reading of *Johnson* is that it barred the use of comparative juror analysis on appeal whether or not that approach was urged before the trial court. Later decisions of this court followed *Johnson* and without exception rejected comparative juror analysis. None says that the reason for not engaging in comparative juror analysis was that the defendant did not raise the matter at trial; many do not even indicate whether the defendant urged comparative jury analysis in support of the motion in the trial court. (See, e.g., *People v. Catlin* (2001) 26 Cal.4th 81, 119, fn. 5 [109 Cal.Rptr.2d 31, 26 P.3d 357]; *People v. Ayala* (2000) 24 Cal.4th 243, 270 [99 Cal.Rptr.2d 532, 6 P.3d 193]; *People v. Jones* (1998) 17 Cal.4th 279, 295 [70 Cal.Rptr.2d 793, 949 P.2d 890]; *People v. Turner* (1994) 8 Cal.4th 137, 164 [32 Cal.Rptr.2d 762, 878 P.2d 521].)[2] In *People v. Montiel* (1993) 5 Cal.4th 877, 911 [21 Cal.Rptr.2d 705, 855 P.2d 277], this court refused to use comparative jury analysis on appeal even though the prosecutor had used that analytic technique at trial to justify his peremptory challenges.

But a unique California rule barring comparative juror analysis on appeal, even if that technique were used in the trial court, would be constitutionally suspect under the recent United States Supreme Court decision in *Miller-El*

[2] *People v. Crittenden* (1994) 9 Cal.4th 83 [36 Cal.Rptr.2d 474, 885 P.2d 887], is not necessarily an exception to this pattern. The defendant there did raise comparative juror analysis at trial. On appeal, this court did not review the defendant's analysis and compare individual jurors, but said that the analysis was inapplicable because the defendant was comparing the challenged Black jurors to other jurors who had also been removed by peremptory challenge.

v. Cockrell (2003) __ U.S. __ [123 S.Ct. 1029, 154 L.Ed.2d 931] (*Miller-El*).[3] In *Miller-El*, the question before the Supreme Court was whether the defendant's *Batson* claim was an appealable issue under 28 United States Code section 2253(c)(2), which requires that the appellant demonstrate "a substantial showing of the denial of a constitutional right." The majority used comparative juror analysis to conclude that the defendant should have been given a certificate of appeal. (*Miller-El, supra*, __ U.S. at p. __ [123 S.Ct. at pp. 1042-1043].) Justice Scalia, concurring, also applied comparative juror analysis. (__ U.S. at p. __ [123 S.Ct. at pp. 1047-1048] (conc. opn. of Scalia, J.).) In dissenting, Justice Thomas disagreed with conclusions of the majority's comparative juror analysis, but not with the appropriateness of the technique. (__ U.S. at p. __ [123 S.Ct. at p. 1053] (dis. opn. of Thomas, J.).)

The United States Supreme Court ruling in *Miller-El, supra*, __ U.S. __ [123 S.Ct. 1029], was made on what could be termed a "chilly," if not a "cold," record. When the jury was selected, the defendant objected to its composition but did *not* use comparative juror analysis. Two years later, after the high court's intervening decision in *Batson, supra*, 476 U.S. 79, the case was remanded to the trial court. The original prospective jurors were not present, and it is open to question how much the trial court could recall of the demeanor and body language of prospective jurors or the circumstances of the challenges. The trial court's ruling on remand was based on a cold record—the written questionnaires and the transcript of the voir dire—plus new testimony offered by the prosecutors to explain their challenges. Yet the United States Supreme Court noted no difficulty in using comparative juror analysis under those circumstances. The unhesitating use of comparative juror analysis by all Supreme Court justices in *Miller-El* is a striking contrast to the language of *People v. Arias* (1996) 13 Cal.4th 92, 136, footnote 16 [51 Cal.Rptr.2d 770, 913 P.2d 980], where this court declared that comparative juror "analysis is largely beside the point, because it ignores the legitimate subjective concerns 'that go into a lawyer's decision to select certain jurors while challenging others that appear to be similar [on the cold record].' " *Miller-El* shows that comparative jury analysis is very much on point when the trial court or the appellate court analyzes the prosecution's explanations for its peremptory challenges. Although the majority here reinterprets *Johnson, supra*, 47 Cal.3d 1194, to permit appellate consideration of comparative juror analysis when that issue was raised at

[3] I was not yet on the court in February of 1989 when it decided *Johnson, supra*, 47 Cal.3d 1194, but I followed that precedent and concurred in post-*Johnson* decisions rejecting comparative juror analysis. The United States Supreme Court's 2003 decision in *Miller-El, supra*, __ U.S. __ [123 S.Ct. 1029] has led me to reconsider the basis for this court's rejection of comparative juror analysis on appeal.

trial, it does not repudiate language from *Johnson, Arias*, at page 136, and other cases denigrating that technique—language which is not in harmony with the United States Supreme Court opinions in *Miller-El*.

The rules of appellate review are clear and simple: With certain exceptions, none applicable here, a party cannot raise on appeal an issue the party neglected to raise at trial. There is no reason to go beyond those rules to perpetuate a separate doctrine that bars a party from raising comparative juror analysis on appeal when it has not been raised at trial.

II

In *Wheeler, supra*, 22 Cal.3d 258, we used two different phrases to describe the standard for a prima facie case. We first said that the moving party "must show a *strong likelihood* that such persons are being challenged because of their group association rather than because of any specific bias." (*Id.* at p. 280, italics added.) We also said, however, that upon the presentation of the moving party's evidence, "the court must determine whether a *reasonable inference* arises that peremptory challenges are being used on the ground of group bias alone." (*Id.* at p. 281, italics added.) Later cases have debated whether these two phrases state the same standard or two different standards. (Compare *People v. Box* (2000) 23 Cal.4th 1153, 1188 [99 Cal.Rptr.2d 69, 5 P.3d 130] [same standard] with *Cooperwood v. Cambra* (9th Cir. 2001) 245 F.3d 1042, 1047; and *Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190, 1196-1197 [two different standards].)

The majority here reaffirms *People v. Box, supra*, 23 Cal.4th 1153, and holds that *Wheeler*'s "strong likelihood" and "reasonable inference" language states the same standard. But it then goes beyond *Box* to describe the standard as requiring a defendant seeking to establish a prima facie case to persuade the trial court that it is more likely than not that the prosecution's challenges had a discriminatory purpose. The correct standard, however, is that the defendant must present facts that support a reasonable *inference* of discriminatory purpose. The distinction is subtle but crucial. A defendant will often be able to present facts, such as a pattern of prosecution challenges, from which a reasonable person can infer discriminatory purpose, but it is only at the next stage, when the prosecutor explains or fails to explain the challenges, that the trial court can determine whether the challenges actually were improper. Requiring a defendant to persuade the trial court of the prosecutor's discriminatory purpose at the first *Wheeler-Batson* stage short-circuits the process, and provides inadequate protection for the defendant's right to a fair trial under the equal protection clause of the federal Constitution (*Batson, supra*, 476 U.S. at pp. 84-89 [106 S.Ct. at pp. 1718-1719]) and his right to a representative jury under the state Constitution (*Wheeler, supra*, 22 Cal.3d at pp. 276-277).

Wheeler, as I noted, used two terms—"reasonable inference" and "strong likelihood"—to define a party's initial burden. "Inference" is defined by statute; it is "a deduction of a fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action." (Evid. Code, § 600.) It is presumed that the Legislature, when it enacts a law that uses a term defined in another statute, is aware of the statutory definition. (*Colmenares v. Braemer Country Club, Inc.* (2003) 29 Cal.4th 1019, 1030 [130 Cal.Rptr.2d 662, 63 P.3d 220]; *People v. Broussard* (1993) 5 Cal.4th 1067, 1080 [22 Cal.Rptr.2d 278, 856 P.2d 1134].) By the same reasoning, it should be presumed that the *Wheeler* court was cognizant of the statutory definition of "inference" when it used that term to describe the standard of proof of a prima facie case. California cases elucidate this definition: an inference "is more than a surmise or a conjecture" (*Aguimatang v. California State Lottery* (1991) 234 Cal.App.3d 769, 800 [286 Cal.Rptr. 57]) and must be based on probabilities, not possibilities (*ibid.*); "it is a reasonable deduction from the facts proved and, of course, must be logical" (*Estate of Braycovich* (1957) 153 Cal.App.2d 505, 512 [314 P.2d 767]). An inference, however, is permissive, and often a single set of facts can support multiple, conflicting inferences. (See *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 337 [100 Cal.Rptr.2d 352, 8 P.3d 1089] ["If such evidence logically permits conflicting inferences . . ."]; *People v. Cooper* (1991) 53 Cal.3d 771, 809 [281 Cal.Rptr. 90, 809 P.2d 865] ["if the prospective juror's responses are equivocal, i.e., capable of multiple inferences . . ."]; *Pasadena Unified Sch. Dist. v. Commission on Professional Competence* (1977) 20 Cal.3d 309, 314 [142 Cal.Rptr. 439, 572 P.2d 53] ["When more than one inference can be reasonably deduced from the facts . . ."].)

"Likelihood," on the other hand, has no statutory definition. In *People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888 [119 Cal.Rptr.2d 1, 44 P.3d 949], this court said it did not necessarily mean "more likely than not." (*Id.* at p. 916.) We then construed that term to describe a standard less demanding than preponderance of the evidence, holding that, consistent with the purpose of the Sexually Violent Predators Act (Welf. & Inst. Code, § 6600 et seq.), a sexual offender should be considered to be "likely" to reoffend "if he or she presents a substantial danger—that is, a serious and well-founded risk—of reoffending." (*Ghilloti, supra,* 27 Cal.4th at p. 916, italics omitted.)

If we merge the two concepts—reasonable inference and strong likelihood—we emerge with the conclusion that the defendant must show facts from which one could logically deduce that there was a substantial danger that the prosecutor's challenges were based on improper grounds. Such a test is less demanding than the majority's requirement of persuading the trial court that discriminatory purpose is more likely than not.

Although past California cases have referred to both the "reasonable inference" and "strong likelihood" standards, none required the defendant to persuade the trial court, at the first stage of a *Wheeler-Batson* proceeding, that the challenges more likely than not had a discriminatory purpose. The vast majority of decisions from other jurisdictions permit the defendant to establish a prima facie case by raising a reasonable inference of discriminatory purpose; they do not require the defendant to persuade the trial court that discriminatory intent is more likely than not.[4] The majority here cites only two decisions from other states as supporting the standard it adopts. Both offer only weak and uncertain support.

The majority first cites *State v. Gonzalez* (1988) 206 Conn. 391 [538 A.2d 210, 213], where the court said that "a defendant must establish by a preponderance of the evidence a prima facie case of purposeful discrimination." But Connecticut adhered to that rule for only a year. In 1989 the Connecticut Supreme Court, under its authority to supervise the administration of justice, abolished the prima facie case requirement and established a one-stage procedure. (*State v. Holloway* (1989) 209 Conn. 636 [553 A.2d 166, 171-172].) Quoting a decision of the South Carolina Supreme Court, the Connecticut Supreme Court said: " 'Rather than deciding on a case by case basis whether the defendant is entitled to a hearing based upon a *prima facie* showing of purposeful discrimination under the vague guidelines set forth by the United States Supreme Court, the better course to follow would be to hold a *Batson* hearing on the defendant's request whenever the defendant is a member of a cognizable racial group and the prosecutor exercises peremptory challenges to remove members of defendant's race from the venire.' " (*State v. Holloway, supra,* 553 A.2d at p. 172, fn. 4, quoting *State v. Jones* (1987) 293 S.C. 54 [358 S.E.2d 701, 703].)

The majority also cites *Stanley v. State* (1988) 313 Md. 50 [542 A.2d 267], which said that the defendant must "prove by a preponderance of the evidence that the peremptory challenges were exercised in a way that shifts the burden of production to the State." (*Id.* at p. 1277.) But *Stanley* goes on to quote a decision of the Florida Supreme Court that in evaluating a defendant's showing, " 'any doubt as to whether the complaining party has met its initial burden should be resolved in that party's favor.' " (*Ibid.*,

[4] See *Cooperwood v. Cambra, supra,* 245 F.3d at page 1046; *Jordan v. Lefevre* (2d Cir. 2000) 206 F.3d 196, 200; *Wade v. Terhune, supra,* 202 F.3d at page 1197; *Cent. Ala. Fair Housing Center v. Lowder Realty* (11th Cir. 2000) 236 F.3d 629, 636-637; *Tolbert v. Page* (9th Cir. 1999) 182 F.3d 677, 679; *Tankleff v. Senkowski* (2d Cir. 1998) 135 F.3d 235, 249; *Lahaffey v. Page* (7th Cir. 1998) 162 F.3d 481, 485; *Burks v. Borg* (9th Cir. 1994) 27 F.3d 424, 1428; *U.S. v. Johnson* (8th Cir. 1989) 873 F.2d 1137, 1140; *U.S. v. Chinchilla* (9th Cir. 1989) 874 F.2d 695, 698; *U.S. v. Chalan* (10th Cir. 1987) 812 F.2d 1302, 1314; *Valdez v. People* (Colo. 1998) 966 P.2d 587, 590.

quoting *State v. Slappy* (Fla. 1988) 522 So.2d 18, 22].) Finally, *Stanley* established a bright-line rule that the exclusion of every member of defendant's racial group established a prima facie case. (*Stanley*, at p. 1284.)

The majority derives its standard not from lower court decisions that directly address the burden of establishing a prima facie case under *Wheeler* or *Batson*, but from references in *Miller-El, supra*, __ U.S. __ [123 S.Ct. 1029], and *Batson, supra*, 476 U.S. 79, to cases under title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) involving alleged invidious discrimination in connection with employment. Although neither *Miller-El* nor *Batson* involved the standard for proof of a prima facie case, the majority views the high court's references as a general endorsement of title VII standards and procedures for use in evaluating *Batson* motions. And the majority asserts that in a title VII case, to establish a prima facie case, the plaintiff must prove that unlawful discrimination is more likely than not. (See maj. opn., *ante*, at pp. 1314-1315.)

The majority's analysis, however, oversimplifies and misunderstands title VII procedure. A title VII plaintiff has the ultimate burden of proving discrimination by a preponderance of the evidence, but whether a plaintiff has met that burden is assessed at the last stage in the procedure. To establish a prima facie case in the first stage, a title VII plaintiff is *not* required to show it is more likely than not that the defendant engaged in illegal discrimination. Instead, the title VII plaintiff is required to prove *facts* from which one can *infer* illegal discrimination.

In *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed.2d 668], and later cases the high court said that a plaintiff alleging unlawful discrimination must, to establish a prima facie case, prove certain specific facts and actions [5] "from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under the Act.'" (*Furnco Construction Corp. v. Waters* (1978) 438 U.S. 567, 576 [98 S.Ct. 2943, 2949, 57 L.Ed.2d 957], quoting *Teamsters v. United States* (1977) 431 U.S. 324, 358 [97 S.Ct. 1843, 1866, 52 L.Ed.2d 396].)

Texas Dept. of Community Affairs v. Burdine (1981) 450 U.S. 248 [101 S.Ct. 1089, 67 L.Ed.2d 207], a title VII case, further explained this same

[5]The specific facts and actions the plaintiff must prove to establish a prima facie case of discriminatory purpose under *McDonnell Douglas* are: "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." (*McDonnell Douglas Corp. v. Green, supra*, 411 U.S. at p. 802 [93 S.Ct. at p. 1824].)

standard. It said: "The burden of establishing a prima facie case of disparate treatment is not onerous. The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which *give rise to an inference of unlawful discrimination.*" (*Burdine, supra*, 450 U.S. at p. 253 [101 S.Ct. at p. 1094], italics added, fn. omitted.)

The next major decision, *St. Mary's Honor Center v. Hicks* (1993) 509 U.S. 502 [113 S.Ct. 2742, 125 L.Ed.2d 407], addressed the question whether the trial court in a title VII action must give summary judgment for the plaintiff if the court had found a prima facie case and determined that the employer's explanation of its action was pretextual. The United States Supreme Court held that the trial court need not give judgment for the plaintiff under those circumstances. The court explained that once a plaintiff has proved facts that give rise to a prima facie case, a presumption of discriminatory purpose arises. The presumption serves the practical function of inducing the defendant to offer an explanation for its actions. (*Id.* at p. 510, fn. 3 [113 S.Ct. at pp. 2748-2749].) Once the defendant offers the explanation, the presumption disappears, and the trial court must decide whether a preponderance of the evidence shows that the employer acted with a discriminatory purpose. (*Id.* at pp. 509-510 and fn. 3 [113 S.Ct. at pp. 2748-2749].)

In *Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133 [120 S.Ct. 2097, 147 L.Ed.2d 105] (*Reeves*) the high court again explained title VII procedure. At issue in *Reeves* was whether the trial court must give judgment for the defendant if the plaintiff presented no additional evidence to rebut the defendant's explanation of its actions. The court said the defendant was not automatically entitled to judgment under these circumstances; instead, the trier of fact still had the duty to determine at the last stage of the procedure whether the plaintiff had proved discriminatory purpose by a preponderance of the evidence. (*Id.* at pp. 142-143 [120 S.Ct. at pp. 2105-2106].) That decision should take into account "the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false," and the other evidence, if any, presented by the parties. (*Id.* at pp. 148-149 [120 S.Ct. at p. 2109].)

The high court's insistence that the trial court determine whether a defendant acted with discriminatory purpose at the last stage, regardless of the falsity or weakness of the defendant's explanation of its actions, is consistent with its language asserting that at the first stage the plaintiff need only prove facts from which discriminatory purpose can be inferred. It would, however, be difficult to reconcile the United States Supreme Court's

position with the view of the majority here. Under the majority's view, when the trial court finds a prima facie case it necessarily finds that the plaintiff has shown it is more likely than not that the employer had a discriminatory purpose. If the employer offers no persuasive explanation, then the trial court, having already found that the plaintiff has met the burden of proof, would have to find for the plaintiff. That indeed is what the Eighth Circuit Court of Appeals held in *Hicks v. St. Mary's Honor Center* (8th Cir. 1992) 970 F.2d 487, and the high court's decision reversing the circuit court's decision (*St. Mary's Honor Center v. Hicks, supra,* 509 U.S. 502) shows that the Supreme Court does not consider a finding of a prima facie case the equivalent of a finding that the plaintiff has proved discriminatory purpose.

Gay v. Waiters' and Dairy Lunchmen's Union (9th Cir. 1982) 694 F.2d 531, a title VII case, explains in more detail the proof of a prima facie case under *McDonnell Douglas*: ". . . *McDonnell Douglas* says nothing directly about the need to prove discriminatory intent. '[T]he evident thought was that proof of the four elements warranted an inference of such intent unless the defendant presented at least some evidence in rebuttal.' *Lieberman v. Gant*, 630 F.2d 60, 63 (2d Cir. 1980) (footnote omitted). . . . [¶] Viewed in this light, the role of the *McDonnell Douglas* prima facie case is closely analogous to its role in general civil litigation: it presents the legal question whether the plaintiff has met his burden of production, coming forward with sufficient probative evidence to permit a rational jury, or court, to find the material facts in his favor, thus avoiding a directed verdict or motion for judgment as a matter of law. A prima facie case of intentional discrimination is established if the plaintiff proves facts 'from which one can infer, if such actions remain unexplained, this it is more likely than not' that the defendant's conduct was racially motivated. *Furnco Construction Corp. v. Waters*, [*supra,*] 438 U.S. 567, 576 [98 S.Ct. 2943, 2949] . . . . As an inference, it can but need not result in an ultimate judgment for the plaintiff. In other words, a prima facie case under *McDonnell Douglas* is one in which the plaintiff has met his immediate burden of production, but not necessarily his ultimate burden of persuasion." (*Gay v. Waiters' and Dairy Lunchmen's Union, supra,* 694 F.2d at p. 543, fn. 10.)

Tompkins v. State (Tex.Crim.App. 1987) 774 S.W.2d 195, 201, a *Batson* case, relied on title VII cases for the principle that: "A prima facie case represents the minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true."

Guz v. Bechtel National, Inc. (2000) 24 Cal.4th 317 [100 Cal.Rptr.2d 352, 8 P.3d 1089], also described the title VII procedure. This court said that the purpose of the prima facie case requirement was "to eliminate at the outset the most patently meritless claims, as where the plaintiff is not a member of the protected class or was clearly unqualified . . . ." (*Guz,* at p. 354.) "While the plaintiff's prima facie burden is 'not onerous' [citation], he must at least show ' "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a [prohibited] discriminatory criterion . . . .' " ' [Citations.]" (*Id.* at p. 355.) What actions, when proved by a preponderance of the evidence, give rise to an inference of unlawful discrimination under title VII procedure? The cases answer this question; they are those actions that, *if unexplained*, permit a reasonable inference of an improper purpose or motive. (*Texas Dept. of Community Affairs v. Burdine, supra,* 450 U.S. at p. 254 [101 S.Ct. at p. 1094]; *Furnco Construction Corp. v. Waters, supra,* 438 U.S. at p. 576 [98 S.Ct. at p. 2949].) I focus on the italicized phrase, because it is here that the trial court went wrong in the case before us.

The ultimate issue raised by a *Wheeler-Batson* motion is not whether the trial judge, or an appellate court, can find a possible neutral reason why a prosecutor might want to challenge a juror, but whether the prosecutor's actual reason for the challenge was based on group bias. "[T]he trial court must determine not only that a valid reason existed but also that the reason actually prompted the prosecutor's exercise of the particular peremptory challenge." (*People v. Fuentes* (1991) 54 Cal.3d 707, 720 [286 Cal.Rptr. 792, 818 P.2d 75]; *People v. Turner* (1986) 42 Cal.3d 711, 721 [230 Cal.Rptr. 656, 726 P.2d 102].)[6]

The threshold for establishing a prima facie case should be relatively low, so that close cases are not decided at the first stage of the inquiry, but only after the trial judge has heard the prosecutor's explanations and is in a better position to determine the propriety of the challenges. In fact, this may be the common practice. This court frequently encounters cases in which the pattern of challenges suggests but does not prove discriminatory purpose and the trial judge asks for an explanation without expressly finding a strong likelihood that the challenges were improper. (See, e.g., *People v. Arias, supra,* 13 Cal.4th 92, 136; *People v. Jackson* (1996) 13 Cal.4th 1164, 1197 [56 Cal.Rptr.2d 49, 920 P.2d 1254].) At times prosecutors even volunteer an explanation without being asked. (See, e.g., *People v. Williams* (1997) 16 Cal.4th 635, 664 [66 Cal.Rptr.2d 573, 941 P.2d 752]; *People v. Howard* (1992) 1 Cal.4th 1132, 1153, fn. 3 [5 Cal.Rptr.2d 268, 824 P.2d 1315].)

[6] In title VII cases, the trial court may find for the employer defendant even if the reason it gave was a sham, if the evidence shows that the defendant gave the false explanation to conceal something other than discrimination, and had a nondiscriminatory reason for its action. (See *Reeves, supra,* 530 U.S. at p. 148 [120 S.Ct. at p. 2108].) But the nondiscriminatory reason must be the *defendant's* reason.

Establishing a low threshold for a prima facie case recognizes that the prosecutor's explanation is often critical to the decision whether the challenge was proper: just as a reasonable explanation will dispel the suspicion of group bias, "[p]roof that [an] explanation is unworthy of credence is . . . probative of intentional discrimination, and it may be quite persuasive." (*Reeves, supra,* 530 U.S. at p. 147 [120 S.Ct. at p. 2108] [title VII case].) The approach set out by the majority would, by contrast, compel trial judges to make decisions when they can only speculate as to the basis for the challenges.

Here defendant showed that the prosecutor challenged all three Blacks on the jury panel, used a disproportionate number of his peremptory challenges against members of that racial group, and failed to engage in any questioning whatever of any these prospective jurors notwithstanding invitations to do so by the trial court. With respect to two of the three jurors, there is nothing in their oral or written responses that stands out to show they would be unacceptable jurors.

Of course there still may be neutral explanations for the challenges, and if it is apparent that the prosecutor had neutral reasons for the challenges, then the pattern of challenges would not give rise to an inference of discriminatory purpose. In such cases the trial court need not find a prima facie case. (See *People v. Bittaker* (1989) 48 Cal.3d 1046, 1092 [259 Cal.Rptr. 630, 774 P.2d 659]; *People v. Howard, supra,* 1 Cal.4th 1132, 1205 (dis. opn. of Kennard, J.).) But that rule should not apply when the trial court can only speculate on the basis for the challenges. (*Howard, supra,* at p. 1207.) The prosecutor does not need to have reasonable grounds for challenging a juror; the challenge passes constitutional scrutiny if it is based on any nondiscriminatory ground. (See *Purkett v. Elem* (1995) 514 U.S. 765, 768 [115 S.Ct. 1769, 1771, 131 L.Ed.2d 834] [prosecutor did not like juror's haircut].) The ability of the trial court to find such a neutral explanation should not defeat the defendant's prima facie case when it is not apparent that the explanation was the true reason for the challenge. In the case before us, for example, the trial court said one reason for the prosecution's challenge of Prospective Juror S. E. could have been her answer to question No. 63 on the juror questionnaire. In that answer, S. E. expressed sympathy for the *victim.* Such sympathy would have been a neutral basis for a challenge, but was not an obvious basis for a prosecution challenge because a prosecutor would generally view a juror who expressed sympathy for the victim as a favorable juror. The other explanations for the prosecutor's challenges suggested by the trial court are also implausible. Thus, the pattern of prosecution challenges here created a reasonable inference of discriminatory purpose, which in the absence of any explanation from the prosecutor is not overcome by the possibility that the challenges could have been based on neutral grounds.

The trial court should have found a prima facie case and asked the prosecutor to explain the basis for the challenges. The court's failure to do so is error, and reversible per se. (See *People v. Fuentes, supra,* 54 Cal.3d at p. 715; *People v. Snow* (1987) 44 Cal.3d 216, 226-227 [242 Cal.Rptr. 477, 746 P.2d 452]; *People v. Turner, supra,* 42 Cal.3d at p. 728.)

APPENDIX C

Per Curiam

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 03–6539

JAY SHAWN JOHNSON, PETITIONER *v.* CALIFORNIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

[May 3, 2004]

PER CURIAM.

We granted certiorari in this case to review a decision of the Supreme Court of California interpreting *Batson* v. *Kentucky*, 476 U. S. 79 (1986). 540 U. S. ___ (2003). The case was briefed and argued, but we now conclude that we are without jurisdiction in the matter.

The California Supreme Court reversed the California Court of Appeal's decision reversing petitioner's conviction. 30 Cal. 4th 1302, 71 P. 3d 270 (2003). The Court of Appeal held that petitioner was entitled to relief under *California* v. *Wheeler*, 22 Cal. 3d 258, 583 P. 2d 748 (1978), and *Batson* v. *Kentucky*, *supra*. 88 Cal. App. 4th 318, 105 Cal. Rptr. 2d 727 (2001). It also noted petitioner's separate evidentiary and prosecutorial misconduct claims, App. 87, but did not determine whether those claims would independently support reversal of petitioner's conviction. The California Supreme Court addressed only the *Wheeler*/*Batson* claim, and, after reversing on that ground, remanded "for further proceedings consistent with [its] opinion." 30 Cal. 4th., at 1328, 71 P. 3d, at 287.

Under 28 U. S. C. §1257, our jurisdiction is limited to review of "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had."

Per Curiam

In *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975), we described four exceptional categories of cases to be regarded as "final" on the federal issue despite the ordering of further proceedings in the lower state courts. In a post-oral-argument supplemental brief, petitioner argues that the fourth of these categories fits this case. That category involves situations:

> "where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." *Id.*, at 482–483.

Here, petitioner can make no convincing claim of erosion of federal policy that is not common to all decisions rejecting a defendant's *Batson* claim. The fourth category therefore does not apply. See *Florida* v. *Thomas*, 532 U. S. 774, 780 (2001). "A contrary conclusion would permit the fourth exception to swallow the rule." See *Flynt* v. *Ohio*, 451 U. S. 619, 622 (1981) *(per curiam)*.

The present case comes closest to fitting in the third *Cox* category, but ultimately falls outside of it. That category involves "those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox Broadcasting, Corp., supra*, at 481. In the event that the California Court of Appeal on remand affirms the judgment of conviction, petitioner could once more seek review of his *Batson* claim in the Supreme Court of California—albeit unsuccessfully—and then seek certiorari on that claim from this Court.

Per Curiam

Compliance with the provisions of §1257 is an essential prerequisite to our deciding the merits of a case brought here under that section. It is our obligation to raise any question of such compliance on our own motion, even though counsel has not called our attention to it. See, *e.g.*, *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379, 384 (1884). But as the present case illustrates, we are not always successful in policing this gatekeeping function without the aid of counsel.

Part of the problem was that the California Court of Appeal's decision was certified by that court for partial publication. It addressed the *Wheeler/Batson* claim in the published portion. 88 Cal. App. 4th 318, 105 Cal. Rptr. 2d 727 (2001). In the unpublished portion, the court briefly addressed petitioner's evidentiary claims to provide guidance for the trial court on retrial, and noted that it would not address whether petitioner's objections were properly preserved or consider petitioner's prosecutorial misconduct claim. App. 58. Petitioner appended only the published portion of the California Court of Appeal's decision to his petition for a writ of certiorari. This Court's Rule 14.1(i) instructs petitioners to include, *inter alia*, any "relevant opinions . . . entered in the case" in the appendix to the petition for certiorari. The full opinion of the California Court of Appeal was not filed in this Court until the joint appendix to the briefs on the merits was filed. App. 58–112. Had the full opinion been brought to this Court's attention, it might have been more evident to us that the

Per Curiam

Supreme Court of California's decision was not final for the purposes of §1257.

A petition for certiorari must demonstrate to this Court that it has jurisdiction to review the judgment. This Court's Rule 14.1(g). And a respondent has a duty to "address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." Rule 15.2. Our Rules also require that each party provide a statement for the basis of our jurisdiction in its brief on the merits. Rule 24.1(e). At all stages in this case, both parties represented that our jurisdiction was proper pursuant to §1257(a). Pet. for Cert. 1; Brief in Opposition 1; Brief for Petitioner 1; Brief for Respondent 1.

It behooves counsel for both petitioner and respondent to assure themselves that the decision for which review is sought is indeed a "[f]inal judgmen[t]" under §1257. Such attention is mandated by our Rules and will avoid the expenditure of resources of both counsel and of this Court on an abortive proceeding such as the present one.

We dismiss the case for want of jurisdiction.

It is so ordered.

APPENDIX D

COPY

Filed 8/5/04
after reversal and remand by California Supreme Court
of partially published opinion filed April 5, 2001

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

FILED
COURT OF APPEAL FIRST APPELLATE DISTRICT
AUG - 5 2004
DIANA HERBERT, CLERK
BY _____ DEPUTY CLERK

THE PEOPLE, Plaintiff and Respondent, v. JAY SHAWN JOHNSON, Defendant and Appellant.	A085450 (Contra Costa County Super. Ct. No. 96-0691-4)
In re JAY SHAWN JOHNSON, on Habeas Corpus.	A106431

Introduction

We come to this case on remand from the California Supreme Court, following its reversal of our previous decision. Defendant Jay Shawn Johnson was convicted of second degree murder of Janika Price, the 19-month-old daughter of his girlfriend, and assault resulting in the death of a child under the age of eight (Pen. Code, §§ 187, 273ab).[1] In December 1998, defendant was sentenced to 15 years to life imprisonment on the murder conviction to run concurrently with the three-year term for corporal injury on a cohabitant.

On appeal from his conviction in the current trial, we reversed the judgment on the grounds that the trial court erred when it failed to find a prima facie case of a violation of *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*) and that defendant was entitled to relief under *Wheeler* and *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*). Justice Haerle dissented. (See *People v. Johnson* (Apr. 5, 2001, A085450).) In our previous opinion in this appeal, reversing the conviction, we also noted defendant's separate evidentiary and prosecutorial misconduct claims, but did not determine whether these would independently support reversal of the conviction. (*Id.*, typed opn. at pp. 22-29.) The California Supreme Court granted review and reversed our decision reversing defendant's conviction. (*People v. Johnson* (2003) 30 Cal.4th 1302.) It addressed only the *Wheeler/Batson* issue and remanded to this court for further proceedings. (*People v. Johnson, supra,* at p. 1328.)[2] Accordingly, with respect to defendant's *Wheeler/Batson* claim, we must conclude that the trial court did not err in finding that defendant failed to establish a prima facie case of such violation. We turn to the remaining issues in the case.

Statement of Facts

The murder victim, 19-month-old Janika Price, and her mother Jennifer Shelton were living with defendant, his three- and four-year-old sons, and his aunt Linda Green and her son. Defendant was not Janika's father. Shelton had known defendant for six or

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[1] The jury convicted defendant upon retrial after a partial reversal on his first appeal. In the first appeal (*People v. Johnson* (July 27, 1998, A076360)), we affirmed defendant's conviction of corporal injury on a cohabitant, Janika's mother Jennifer Shelton (Pen. Code, § 273.5), but reversed his convictions of second degree murder and assault on a child leading to death for error in jury instructions on the cause of death. There have been three trials in this case. The first ended in a mistrial. The second trial before Judge Westover resulted in the first appeal and is referred to by the parties as the "prior" trial. The third trial, which the parties refer to as the "current" trial, occurred in December 1998 before Judge Sepulveda, and is the subject of the instant appeal.

[2] The United States Supreme Court granted certiorari to review the California Supreme Court's decision interpreting *Batson, supra,* 476 U.S. 79. After briefing and argument in the United States Supreme Court, the court concluded it was without jurisdiction in the matter because the judgment was not final as the remaining issues had not been finally determined following remand and appellate review. (*Johnson v. California* (2004) 541 U.S. ____, No. 03-6539.)

seven months and had moved in with him, but it was not a good relationship. Defendant was physically abusive to Shelton and beat her frequently.

On February 19, 1996, defendant and Shelton argued about Janika. Shelton complained that defendant played too roughly with Janika. Defendant accused Shelton of spoiling Janika. Defendant hit Shelton in the face, kicked her in the foot, and kicked her again as she lay on the floor. When defendant left, Shelton fell asleep in the bedroom. She woke up when she heard Janika crying. The crying was unusual and sounded like Janika was hurt. A few minutes later, Shelton went into Janika's room and found her lying on her bed with her face to the wall. Shelton leaned down to kiss Janika and noticed she was pale and wheezing. Shelton asked defendant whether something was wrong with Janika. Defendant said Janika had thrown up, and he had cleaned her up and put her in bed. Shelton picked Janika up, discovered she was limp, and brought her into the living room.

Shelton called 911. In the meantime, defendant came in, picked up Janika, and gave her some water. Janika drank the water, but went limp again. Paramedic Robert Duvall arrived at 10:31 p.m., within three minutes of the 911 call. He asked what had happened, and defendant told him Janika had fallen out of her crib around 4:00 p.m. but had been fine until the 911 call. Duvall observed a bruise on Janika's forehead that was consistent with a fall. There was light bruising and some vomit on her chest. She had no blood pressure or pulse, and her pupils were fixed and dilated. Janika had been dead for at least six minutes.

Dr. Brian Peterson, who performed the autopsy on Janika, testified that the cause of death was blunt force injuries to the chest, causing the heart to rupture. Such injury would cause death within a minute or so. There could be vomiting within this period. Janika's body had other injuries, scars, and bruises that indicated a pattern of child abuse. According to Dr. Peterson, it would take a substantial amount of force, such as a hard punch or a sharp kick, to cause the heart to rupture. Dr. Peterson likened the amount of force to that which an unrestrained driver would suffer in an automobile collision at freeway speed. Accidentally stepping on the child would not have been sufficient to

cause the fatal injury.

Detective David Krastof testified that he interviewed defendant twice at the police station on February 20, after Krastof had met with Dr. Peterson. The first interview was videotaped, but only the sound portion was recorded correctly. The second interview was fully videotaped. Both tapes were played for the jury.

In his first interview, defendant initially denied having had a fight with Shelton on the night of Janika's death, but later admitted they had an argument. Defendant said nothing about hitting Shelton. Defendant said he was putting up some posters in the children's room while Janika played with his sons. Janika threw up on her bed. Defendant cleaned her up. Shelton came in, said Janika was not breathing right, and took her into the other room. Defendant claimed he performed cardiopulmonary resuscitation (CPR) on Janika after she stopped breathing, but did so by applying only light pressure. When Krastof said defendant's story did not match reports from the pathologist, defendant asked for a lawyer. Krastof placed defendant under arrest.

A few hours later, after talking to his mother, defendant said he wanted to resume talking. In this second videotaped session, defendant admitted he had a violent fight with Shelton. He dragged Shelton by her hair into the bedroom, slapped and kicked her and then went into the kids' room to clean up. When Janika threw up, defendant cleaned her face and put her down. Shelton came in a little later, picked up Janika, and noticed she was not breathing right. Defendant looked at Janika, gave her some water, and she stopped breathing. Defendant put Janika on the table, breathed into her mouth, and hammered on her chest, twice, "pretty hard."

Krastof advised defendant his story was not consistent with the medical evidence. Defendant then said he had been chasing a rat around the kids' room. While chasing the rat, he accidentally stepped on Janika's chest. He picked her up. She was screaming, but she seemed fine. She threw up right after he put her on the bed. Defendant insisted he did not kick Janika. Krastof insisted the evidence showed otherwise, and defendant eventually changed his story to say that he had accidentally kicked Janika in the chest when he backed up. Defendant said: "I did kick her. [¶] . . . [¶] I didn't know I kicked

her. I didn't know until I explained myself just now, when I jumped back." Defendant said he lied initially because he did not want to be seen as a murderer. Defendant continued to insist that his kicking Janika's chest was an accident.

Detective Krastof saw some small bruise marks on Janika's forehead. He located defendant's BB gun under a boat at a residence two houses away and fired it at the arm of another officer. Krastof testified that the marks made by the BBs on the officer's arm were similar to the marks on Janika's face.

Defendant testified in his own defense. In the early evening on February 19, 1996, he and Shelton had a fight in which he grabbed her by the hair, knocked her down, and kicked her a couple of times. He admitted that he had been violent with Shelton before. After the fight, he went into the children's room to put up some posters and clean it. All three children were there. As he moved the boys' bed, he saw a rat. Defendant put Janika on the bed and asked the boys to help him catch the rat that had run into the closet. He got a BB gun to shoot the rat. The boys shook the clothes, and the rat ran out. Defendant jumped back as the rat came toward him and he stepped on Janika. Janika screamed, and he picked her up to console her.

Several minutes later, Shelton came into the room and said Janika was not breathing right. Defendant's aunt, Linda Green, said the same thing a few minutes later. Defendant went into the living room where Shelton told him Janika was not breathing. Defendant picked up Janika and gave her some water. Janika stopped breathing and went limp. Defendant told his aunt to call an ambulance and began doing CPR. Defendant hit Janika on the chest, trying to "jump start" her heart, as he had seen it done on television. Defendant denied ever physically abusing or intentionally hurting Janika. He also denied ever shooting her with a BB gun.

Defendant's aunt Linda testified that she had heard the fight in the bedroom, had seen defendant and the boys chasing a mouse, and had previously seen mice in the apartment. She did not hear Janika cry. She confirmed that Janika was breathing "funny," that defendant gave her some water, after which Janika went limp. Defendant tried to administer CPR and hit Janika in the chest in doing so.

To dispute the timing of events provided by defense witnesses, the prosecution offered the rebuttal testimony of defendant's next-door neighbor, Terry Davidson. He heard physical fighting and a woman scream, "You killed her," "Oh my God, she's dead." The police arrived 15 to 20 minutes later.

To rebut defendant's claim that he would not let anything happen to his boys, the prosecution offered the testimony of Tammy Keller, the cousin of defendant's ex-wife. Keller testified that defendant walked in, uninvited, to the apartment she was sharing with defendant's ex-wife on August 27, 1993. He seemed very upset. When the ex-wife called, defendant got on the phone and became even more angry and started screaming, even though the boys were asleep. Defendant ignored Keller's request to lower his voice and instead proceeded to urinate in the sink on her dishes. The third time she asked him to lower his voice, he ripped the phone out of the wall. Defendant then went on a rampage. He picked up his young son and carried him like a football. While still holding the child, defendant threw a fish tank through a window, broke the glass coffee table, and tried to throw the television set out the window. Defendant bumped the child's head on the door frame and on the television set. Keller tried to stop defendant from leaving with his young son, but defendant pushed past her.

Issues on Remand

On appeal (A085450), defendant has challenged a number of evidentiary rulings and has raised claims of prosecutorial misconduct and ineffective assistance of counsel. In a related petition for habeas corpus, filed on May 11, 2004 (A106431), defendant expands upon his claim of ineffective assistance.[3] Although we briefly addressed some of the evidentiary issues in our previous opinion in this appeal in order to provide guidance to the trial court in the event of retrial, we did not determine whether objections were properly raised and preserved. Nor did we determine whether any errors found

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[3] Pursuant to our request, the Attorney General filed an informal response to the petition on June 9, 2004. (See *People v. Romero* (1994) 8 Cal.4th 728, 737; Cal. Rules of Court, rule 60.)

were prejudicial. We expressly did not address defendant's claim that the prosecutor committed misconduct by switching theories as to the instrumentality of death, because the issue did not involve an evidentiary ruling.

I.

Prosecutorial Misconduct and Ineffective Assistance of Counsel

On appeal and in the recently filed petition for habeas corpus, defendant contends that he was denied a fair trial because the prosecutor switched theories of the instrumentality of death, from a punch to a kick, between the prior trial[4] and the current trial. He argues the prosecutor committed misconduct by advancing the theory in the current trial that defendant killed Janika by kicking her. He asserts this theory was disproved by the prosecution's own witnesses at the prior trial and that the prosecutor had used that testimony at the prior trial to argue that the victim had been killed by a punch. He further contends, both on appeal and in the writ petition, that his trial counsel rendered ineffective assistance in failing to introduce prior testimony by prosecution witnesses Krastof and Dr. Peterson to the effect that a boot kick did not cause the fatal injury and in failing to either move for a mistrial or to reopen for the taking of additional evidence after closing argument to the jury began.

We find no misconduct by the prosecutor and no prima facie case of ineffective assistance by defense counsel.

A. Prosecutorial misconduct claim

Defendant cites no authority that a switch in theory between trials as to the instrumentality of death constitutes prosecutorial misconduct and we have found none. Rather, defendant contends the prosecutor offered false evidence and misled the jury as to the forensic and medical facts relating to the manner of Janika's death. He builds his argument upon the American Bar Association Standards for Criminal Justice Prosecution

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[4] Upon defendant's request, we take judicial notice of the record in the prior appeal (*People v. Johnson, supra*, A076360). (Evid. Code, §§ 451, 452.)

Function and Defense Function (3d ed. 1993) (ABA Standards) and accompanying commentary. These provide in relevant part:

"Standard 3-5.6 Presentation of Evidence: [¶] (a) A prosecutor should not knowingly offer false evidence . . . ." (ABA Standards, *supra*, at p. 100.)

"Standard 3-5.8 Argument to the Jury: [¶] (a) In closing argument to the jury . . . the prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw." (ABA Standards, *supra*, at p. 106.)

"Commentary: [¶] . . . Prosecutorial conduct in argument is a matter of special concern because of the possibility that the jury will give special weight to the prosecutor's arguments, not only because of the prestige associated with the prosecutor's office, but also because of the fact-finding facilities presumably available to the office." (ABA Standards, *supra*, com. to std. 3-5.8, at p. 107.)

Defendant premises his claim of prosecutorial misconduct upon the prosecutor's supposed switch in theory between the prior and current trials as to the cause of Janika's death—from a punch to a kick—which he claims misled the jury and "misstate[d] undisputed medical or forensic facts." Defendant argues that testimony by prosecution witnesses Krastof and Dr. Peterson in the prior trial "totally disproved any kicking theory"; that the prosecutor "omitted to adduce" and "deliberately withheld" prior testimony by the two, which "fully contradicted the theory that [defendant] kicked Janika to death"; that the prosecutor "argued a factual theory which the prosecutor's own witnesses had totally disproved at the prior trial."

The invalid premise of defendant's argument is that the kicking theory had been "totally disproved by the sworn statements of [the prosecution's] own police and expert witnesses" at the prior trial. At most, the prosecutor changed his emphasis between the two trials as to how defendant killed Janika. At both the prior trial and at the current trial, Dr. Peterson testified that the right atrium of the heart had been ruptured by a "blunt force" trauma. At both trials, Dr. Peterson consistently testified that the best analogy for the force of the blow to the chest was of injuries to adults involved in highway speed car accidents while not wearing seat belts or shoulder harnesses who were thrown against the

steering wheels. "Blunt force simply means a blunt object was used to apply this force to the body." Moreover, at the prior trial, Dr. Peterson testified that *he could not say with certainty* whether a punch or a kick to the chest was the source of the blow that caused Janika's heart to rupture.[5] Regarding the absence of a definitive mark on the chest, when

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[5] In the prior trial, Dr. Peterson testified: "Now there were no specific patterns on this little girl's body that I could associate with a shaped object. There was no shape of a led [*sic*] pipe. There was no shape of a wrench. There was no particular imprints that was suggestive of knuckles, for example. [¶] So by using the term 'blunt force,' I simply mean that significant force was applied to the chest but in a vague sort of way so as not to leave a pattern. [¶] *And any number of types of force application could have caused that.*" (Italics added.)

Peterson had no doubt that Janika was killed or injured due to abuse. On cross-examination at the prior trial, Peterson again testified that he had found no patterns on the skin. Asked whether it was correct that "[i]f someone was to punch a child, you would see an indicator force of fists or knuckles," Peterson replied, "Commonly not, no. It's—it must have something to do with children. The tissues are quite flexible." He testified he had never seen a specific shaped pattern on the abdomen of a child who had been killed by a blow to the abdomen. Nevertheless, a signature force or application pattern was "something we always look for. It's a nice thing to find. If you can find something that matches an object and you can tell the police to look for that object, that's a helpful thing. [¶] So it's one of those features that it's nice if you have it. *Normally you don't have it, particularly on children.*" (Italics added.)

Peterson also was cross-examined regarding the type of surface needed to cause the fatal heart injury.

"Q. . . . [W]hat surface would be needed to cause the atrium destruction that you referred to?

"A. . . . [T]he issue was that there [were] some things that were not there. There was not a bruise to the skin over the breastbone. There was not a fracture of the bone. There was no bleeding inside the muscle. So I don't think it was a point force like the end of a rod or something like that. It was a relatively wider force. *But that could have been a lot of things. It could have been the sole of a foot. It could have been a fist or a wall. It could have been any number of things that were sufficiently wide not to leave a pattern, but sufficiently small to focus force on the heart and rupture it.*" (Italics added.)

"Q. Okay. You also said it could have been the area of a hand, correct?

"A. Yes.

"Q. *But you also said it wouldn't have been a narrow area like a toe; is that correct?*

asked by defense counsel at the current trial whether a kick to the chest with pointy toed boots could cause the particular kind of injury or make a signature mark suggesting that it was a particular kind of boot, the doctor replied: "my answer is always going to be, it

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"A. *Well, I did not see a pattern consistent with that. Could an injury from the toe have been applied and not leave a pattern? I don't think so. But I guess almost anything could happen.* (Italics added.)

"Q. Let's assume a person was wearing a hiking boot with a very defined rounded edge, a tip, okay? Would that area be consistent with the narrow sort of force you're referring to leaving a U or a signature application upon the chest?

"A. Well, I believe that's two separate questions. [¶] *Could that type of force cause this injury? Most certainly.* [¶] *Did I think that it did? No, because there was no such pattern.* (Italics added.)

"Q. Okay. The key question then is you did not see any pattern consistent with the edge of a boot hitting the child chest, correct?

"A. That's correct."

Asked how the abdominal and chest injuries occurred, Dr. Peterson answered:

"A. [¶] . . . [¶] In terms of injuries, my opinion is that more than likely the child was punched in the abdomen on more than one occasion to account for the older and newer bleeding inside the mesentery. [¶] *As far as the chest injury goes, I can see that happening any number of ways.* I suspect if somebody is willing to punch a . . . child in the stomach, someone could also be willing to punch a child in the chest and that could account for the injury there." (Italics added.)

In discussing the older injury to the abdomen, Dr. Peterson opined that the child had been punched hard enough in the abdomen on more than one occasion to cause the bleeding in the mesentery and perhaps also the microscopic perforation in the bowel. He agreed that a punch was the most likely force to cause the abdominal injuries. Asked whether he was "able to distinguish a punch causing [the abdominal injuries] or could [it] have been a kick, a fall or anything like that to the abdomen area," Dr. Peterson answered: *"It was not a fall. This was inflicted. What I can say for sure is that, again, similar to the chest injury, there was no pattern on the skin. So it could have been a kick. But, again, I did not see a shoe pattern or a sole pattern.* [¶] *Could it have been a punch? Absolutely. An elbow? Sure. Because there was no pattern, I can tell you what wasn't there. But it's harder to say what it must have been. I can tell . . . you what it may have been.*" (Italics added.)

On redirect at the prior trial, the prosecutor showed Dr. Peterson the boot defendant had been wearing that day and asked, "Looking at this shoe, would the injury to the chest, if it was kicked with the top of the tip area like that, would that have been a cause of some of the injuries you observed?" Dr. Peterson answered: *"I guess it could have. Again, I didn't see any specific pattern on the chest. I don't believe that the tip of that shoe would have caused a fatal injury. . . ."* (Italics added.)

depends. . . . [¶] Can I envision a specific type of boot leaving a type of pattern? Absolutely. Can I envision not leaving a mark? Absolutely."

However, Dr. Patterson consistently maintained at both trials that the blow was inconsistent with the type of accidental injury claimed by defendant, whether from defendant's accidentally stepping on Janika during defendant's pursuit of the mouse or from the defendant's negligent application of CPR. Nor would a rapid compression of the palm area cause the same kind of compression as the blunt force trauma that occurred here.

At the prior trial, Krastof testified that the brown and green hiking shoes recovered from defendant's house were dirty and that he saw no dirt, footprints, or other marks consistent with marks left by the shoe on the t-shirt Janika had been wearing. No such testimony was elicited by the defense or the prosecution at the current trial. However, defendant did identify the boots (exhibit No. 20) during cross-examination by the prosecutor, but stated they were much dirtier than they had been on the day he kicked Shelton and stepped on Janika. Moreover, at the current trial, defendant testified that, after he stepped on Janika, she threw up and he cleaned up the mess. Shelton also testified that defendant told her that Janika had gotten sick, thrown up, and that he had cleaned her up and put her to bed. The jury could certainly infer that defendant's cleaning up of Janika following her vomiting had included changing her t-shirt.

We conclude that, contrary to defendant's claim, evidence at the prior trial did not *exclude* the possibility that a kick had caused the blunt force trauma that killed Janika. Indeed, in argument at the prior trial, the prosecutor acknowledged that an intentional kick could have caused the fatal injury.[6]

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[6] At the prior trial, the prosecutor referred to the various kinds of abuse suffered by Janika, including being "kicked," "stomped" and "punched." He also argued with respect to defendant's failure to tell the authorities that he had kicked Janika: "What about the kicks? I forgot about the kicks. You forget about the kicks. You kick a child so hard all the air comes out of it; the child throws up; the child is crying and you're sitting there saying, according to your testimony, daddy is sorry. Daddy is sorry. You forget this? Later on the kid stops breathing and this skips your mind? You don't

Nor did the prosecutor's closing argument at the current trial misstate "undisputed medical or forensic facts" as argued by defendant. The prosecutor argued that the child was already dead during defendant's attempt to administer CPR, that the force necessary to cause the injury was not consistent with "that kind of punch" and that it was a "force more consistent with a foot than a fist." Nevertheless, although arguing that defendant kicked Janika to death, the prosecutor acknowledged the possibility that an intentional punch could have been the means of inflicting the trauma. During his final closing argument, the prosecutor argued that defendant had not accidentally stepped on Janika, stating: "I don't care how you look at it. You want to go with the kick, fine. *You want to go with the punch, fine.*" (Italics added.)

Nor did the prosecution's change of emphasis during the current trial unfairly "surprise" the defense. During pretrial hearings, the prosecution unsuccessfully sought to bring character evidence into it's case-in-chief regarding defendant's modus operandi of kicking when angered. The prosecutor contended that defendant's use of his foot was "the trademark" or a "signature." The prosecutor argued, "And [when defendant] feels that he is provoked, his response [is] to use violence and in a manner particularly of kicking." Defense counsel countered that defendant's kicking Shelton in the foot and nowhere else was not sufficiently connected with the method of death of Janika as "[t]here is no testimony that she [Shelton] was kicked in the torso or stomped on the chest." Defense counsel at that point recalled that in the prior trial he had tried to present

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remember that." With respect to the assault instruction, he argued, "In this case, since the child was struck, we know he had the ability. We know the kid was hit by the defendant. We know he assaulted the child. There was no justification for punching the child in the stomach a couple of days before. *There was no justification for stomping on the kid or kicking the kid while they was* [*sic*] *in the bedroom.* There was no justification about this alleged CPR." (Italics added.) At the prior trial, the prosecutor argued that the punch to Janika's abdomen, occurring a few days before the blow to the chest, would have proved fatal. He also argued that defendant lied when he said "he never hit the kid, never stepped on the kid. No evidence of that? Yeah, there is. The kid suffered these injuries." He also argued that defendant's claims to have accidentally kicked Janika while trying to catch the mouse and to have injured Janika while performing CPR were unbelievable.

through Dr. Peterson evidence of defendant's foot on Janika. "It's my recollection that Doctor Peterson—one of the things I actually was trying to present was the act of the foot by Mr. Johnson on the child's baby (sic). The detective and the Coroner said no foot imprints [were] placed on the child. The baby was wearing a white or clean T-shirt. [¶] And that the detective, when he collected evidence of . . . Johnson's boots, they were very dirty. There were no footprints or none of this left on the child's shirt to suggest that he used his foot to—to kick this child. [¶] So I find it somewhat ironic now on the third trial the People are trying to present a sort of inconsistent argument to get into domestic violence. Mr. Johnson, who kicked Jennifer Shelton in the foot is supposedly to have used a boot that was supposedly dirty to kick the child when the prosecution witnesses came in to argue contrary to that point of view."

The trial court ruled at that point under Evidence Code section 352 that it would not allow the prosecution to introduce into its case-in-chief "that defendant has an M.O. of kicking people."

At a later point in the pretrial hearings, the court acknowledged that our opinion on the appeal of the prior trial had eliminated the blow to Janika's stomach as a possible cause of death, leaving the possible causes "C.P.R. versus kicking. I guess we might have that. Was it a blow to the chest, a kick? We'll take that up later. [¶] As far as . . . the earlier blow to the stomach versus whatever happened to the chest, the Court of Appeal decided that issue about the stomach blow at least. And we'll take up the other issues after the evidence goes in." Defendant was not and could not have been surprised by the prosecutor's change in emphasis at trial from a punch to a kick.

We find no prosecutorial misconduct.

B. Ineffective assistance claim

Defendant argues on appeal and in his related habeas petition that trial counsel was ineffective when counsel initially failed to introduce the prior testimony of Krastof and Dr. Peterson that a boot kick did not cause the fatal injury and that defense counsel was ineffective in failing either to move for a mistrial when surprised by the prosecutor's switch of theory or to move to reopen for the taking of evidence after jury argument

began. We note that defendant was represented by the same counsel at both the prior trial and the current trial.

1. Standard of review

Both the federal and California Constitutions guarantee the right to effective assistance of counsel. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) Defendant carries the burden of rebutting, by a preponderance of the evidence, a presumption that he received effective assistance. (*People v. Garrison* (1989) 47 Cal.3d 746, 788.) The claim of ineffective assistance of counsel involves two components: (1) defendant must show that counsel's performance was deficient, and (2) defendant must establish prejudice. (*Id.* at p. 786; *People v. Ledesma,* at pp. 216-217.)

To be deficient, counsel's performance must have fallen " 'below an objective standard of reasonableness . . . under prevailing professional norms.' [Citations.]" (*People v. Ledesma, supra*, 43 Cal.3d at p. 216.) In applying this prong of the test, courts must exercise deferential scrutiny so as to avoid the dangers of " 'second-guessing.' " (*Ibid.*)

Further, except in circumstances not here relevant, prejudice must be affirmatively proved. "[T]o be entitled to reversal of a judgment on grounds that counsel did not provide constitutionally adequate assistance, the petitioner must carry his burden of proving prejudice as a 'demonstrable reality,' not simply speculation as to the effect of the errors or omissions of counsel." (*People v. Williams* (1988) 44 Cal.3d 883, 937.) " 'The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " (*People v. Ledesma, supra,* 43 Cal.3d at pp. 217-218.)

"Because a petition for writ of habeas corpus seeks to collaterally attack a presumptively final criminal judgment, the petitioner bears a heavy burden initially to *plead* sufficient grounds for relief, and then later to *prove* them." (*People v. Duvall* (1995) 9 Cal.4th 464, 474.) If the petitioner fails to allege facts that, if true, would entitle

him to relief, no prima facie case has been stated and the petition may be summarily denied. (*Id.* at pp. 474-475.)

2. *Evidence in support of petition*

Because we review defendant's claim pursuant to a habeas petition, our review is not confined to the appellate record. (See, e.g., *People v. Ledesma, supra,* 43 Cal.3d at pp. 218-219; *People v. Gutierrez* (1993) 14 Cal.App.4th 1425, 1438.) Defendant has submitted only the declaration of his appellate counsel, Stephen B. Bedrick, in support of his petition. Appellate counsel relates that defendant's trial counsel Patrick Cannon refused to provide a signed, written declaration in support of the habeas petition. Appellate counsel then relates that trial counsel told appellate counsel that: (1) trial counsel did not realize that the prosecutor had switched theories between trials; (2) trial counsel had spoken with Dr. Peterson before the current trial and thought Dr. Peterson's testimony was going to be the same at the current trial as it had been at the prior trial; (3) trial counsel did not realize during the current trial that Dr. Peterson's testimony was different from his testimony at the prior trial; and (4) trial counsel does not respond to opposing counsel's comments, because they are not evidence. Appellate counsel therefore opines that trial counsel had no valid tactic or strategy for failing to bring out evidence that would have disproved the prosecution's theory that death occurred by kicking.

As the Attorney General points out, the declaration of appellate counsel is "riddled with inadmissible evidence." Specifically, appellate counsel's statements setting forth what trial counsel said to him are entirely inadmissible hearsay. (*People v. Madaris* (1981) 122 Cal.App.3d 234, 242, disapproved on other grounds in *People v. Barrick* (1982) 33 Cal.3d 115, 127; see *In re Fields* (1990) 51 Cal.3d 1063, 1070.) "It has long been the rule of California that factual allegations on which a petition for habeas corpus are based must be 'in such form that perjury may be assigned upon the allegations if they are false.' (*Ex parte Walpole* (1890) 84 Cal. 584.) Here the critical allegations were patently not in such form." (*People v. Madaris, supra,* 122 Cal.App.3d at p. 242.)

In any event, neither the declaration nor the appellate record in this case establish a prima facie case of ineffective assistance.

Were we to consider trial counsel's statements to appellate counsel, they indicate to us that defense counsel did not view the evidence or the prosecutor's argument as involving a radical shift in theory. We have reached the same conclusion with respect to the prosecutorial misconduct claim above. The shift in emphasis was not a major and significant change in theory, as speculated by appellate counsel. The central theory of the prosecution was the evidence that death was caused by an intentional blow to the chest by a blunt force. Whether the blow was from a kick or a punch was ultimately not knowable from the forensic evidence.

Moreover, the record itself shows that defense counsel was well aware of the prosecutor's shift in emphasis. As we have discussed above, counsel was not "surprised" by the prosecutor' switch in emphasis from the theory at the prior trial that the fatal blow was a punch either to Janika's chest (that evening) or to her abdomen (a day or two before her death), to the theory at the current trial that the fatal blow was a sharp kick to her chest. This indicates a tactical decision by trial counsel to refrain from cross-examining Dr. Peterson regarding his opinion at the prior trial that the fatal blow was probably not a sharp kick with the toe of a boot, and to forego cross-examining Officer Krastof regarding defendant's dirty boots and the lack of dirt marks on the t-shirt Janika was wearing.

Defense counsel argued, in the current trial, that defendant was not guilty of second degree murder as defendant had no intent to kill Janika when he either accidentally stepped on her and/or when he incorrectly administered CPR. Defense counsel contended that at most defendant was guilty of involuntary manslaughter. Counsel relied upon defendant's testimony that defendant was startled by a mouse, jumped back and accidentally stomped on Janika and, when Janika began having difficulty breathing, that defendant incorrectly gave her CPR by "rather stupidly" hitting her in the chest to try to revive her.

Given that a key part of the defense was defendant's story about accidentally stepping on Janika during pursuit of the mouse, the lack of a boot imprint or a dirty t-shirt could serve to highlight the likely falsity of that defense. Furthermore, defense counsel did ask Dr. Peterson at the current trial about the likelihood that a pointy-toed boot would leave a mark and the doctor testified that such a blow might leave a mark and might not. In addition, the boots *were* introduced into evidence during defendant's testimony and he stated they were "dirtier" than they had been the night Janika was killed. There was no need to cross-examine Krastof regarding them.

A fortiori, given the likely tactical decision not to undermine defendant's story that he accidentally stepped on or kicked Janika by eliciting testimony that a kick was less likely the cause of death than a punch, and the fact defendant was not surprised by the prosecutor's emphasis on a kick, defense counsel's failure to move for a mistrial or to move for reopening of evidence upon the prosecutor's argument was a reasonable tactical choice.

In any event, defendant has not carried his burden of establishing prejudice from any claimed ineffective assistance as a demonstrable reality. The evidence showed that a sharp blow to the chest—either a punch or a kick—caused Janika's death. Had defense counsel tried to impeach Dr. Peterson with his prior testimony that he had not seen an injury consistent with a kick from the boot toe and that he thought such a blow would leave a pattern, the prosecution would doubtless have introduced Dr. Peterson's qualifying remarks at the prior trial that "almost anything could happen" and that that type of force "[m]ost certainly" could have caused this injury, and his overall recognition that it "could have been a lot of things. It could have been the sole of a foot. It could have been a fist or a wall. It could have been any number of things that were sufficiently wide not to leave a pattern, but sufficiently small to focus force on the heart and rupture it." Such a blow was inconsistent with defendant's accidentally stepping on Janika and with the application of CPR by defendant. The jury necessarily found defendant was not credible and that he had killed Janika with malice.

Defendant has failed to state a prima facie case of ineffective assistance of counsel.

II.

The Videotaped Interviews

Defendant next contends on appeal that the trial court erred in admitting lay opinions of Police Officers Krastof and Cope contained in the videotapes of their two interviews with defendant, during which they repeatedly stated their opinions that defendant was lying. In our previous opinion in this appeal, we stated: "A police officer's personal opinion regarding the credibility of an interviewee generally is inadmissible either as lay testimony or as expert testimony and should have been redacted upon proper objection. (*People v. Melton* (1988) 44 Cal.3d 713, 744; *People v. Smith* (1989) 214 Cal.App.3d 904, 915-916; *People v. Sergill* (1982) 138 Cal.App.3d 34, 40.)" (*People v. Johnson, supra*, A085450, typed opn. at pp. 26-27.)

The parties dispute whether the error was waived by defense counsel who, despite raising objections to the officers' opinions on the tape before it was played, never sought to redact specific parts of the officers' opinions when given the opportunity to do so by the court. Before the first interview tape was played for the jury, defense counsel objected only to the reference to acts of domestic violence against other individuals, which objection was sustained. The court then inquired whether defense counsel had other objections, asking: "Mr. Cannon, are you satisfied now? Have you gone through the transcript and you're satisfied there's nothing else that you want taken out?" Defense counsel replied, "I'm hoping not." The court also urged defense counsel to review "the next tape to make sure that everything is redacted that's supposed to be." The next day, the court sought to confirm that defense counsel had "had an opportunity to go through the second tape of the Defendant's statement to the police." Defense counsel acknowledged that he had and when asked whether it was "properly redacted," defense counsel confirmed, "It's acceptable, Your Honor." At no point in either discussion with the court did defense counsel object to the statements defendant now challenges, nor alert the court to his previously expressed concerns and seek a final ruling on the matter.

Clearly, the claim was waived. (Evid. Code, § 353; *People v. Rowland* (1992) 4 Cal.4th 238, 259 [waiver by failure to secure a ruling].)

In any event, and to forestall a claim of incompetence of counsel, we also conclude that the error in failing to fully redact the tape of the officers' opinions that defendant was lying was necessarily harmless. Defendant was certainly lying to the officers and both in the second videotaped interview and at trial he admitted that he had done so. At trial he repeatedly admitted he had lied to the police and to the jury in his previous trials.[7] Neither officer was asked at trial to opine on defendant's veracity.

Given the overwhelming evidence that defendant had, in fact, lied repeatedly about the circumstances surrounding Janika's death in a myriad of respects, the officers'

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[7] For example, defendant admitted on the stand that he had "lied about a lot of things"; he admitted having lied to this jury about having fed the children breakfast on the morning of Janika's death; he admitted having lied under oath at the prior trial when he testified he did not kick Shelton and that he had not knocked her down immediately before Janika's death. Defendant admitted having lied to the police officer at the taped interview about not having kicked Shelton. He admitted having lied to the officers about beating up on Shelton and knocking her down. He did so in order to protect himself and because he was scared. Defendant admitted having lied at the prior trial about whether he had told the officers he had kicked Shelton; he admitted that he had lied to protect himself and that he "[would] lie today to protect [his] honor." Defendant admitted having lied to the police during the first videotaped interview about having stepped on Janika. He admitted lying to the officers when he told them he never hurt anybody before. He admitted lying to the police about the manner in which the child had been injured. He admitted lying to the police during the first interview tape when he demonstrated to the police officers that he lightly pushed on Janika's stomach as a form of CPR. He lied when he told the police he had called 911 and that he had called an ambulance, when in fact he had not called the ambulance and had told the other adults present not to call 911. At the current trial, defendant denied having had training in CPR. He was impeached by prior testimony and his admission that he was taught how to do CPR in high school. He admitted having lied to the police officers about the argument he had had with Shelton that led to his beating her up, telling them it was over gas for the car and diapers, when in fact the argument was over his mistreatment of Janika. He admitted he had not testified truthfully at the prior trial about a previous occasion when Janika became unconscious while alone in his care, when he testified that the door to the room they were in was locked because a friend had locked it upon leaving. In fact the door could only be locked from the inside.

expressions of opinion in the taped interviews that they believed defendant was lying added little to the evidence the jury heard. It is not reasonably probable that their opinions during the interviews that defendant was lying prejudiced defendant or that redaction of their opinions from the tape would have led to a result more favorable to defendant. (*People v. Melton, supra,* 44 Cal.3d at p. 745; *People v. Smith, supra,* 214 Cal.App.3d at pp. 915-916.) Clearly, the error did not alter the outcome of the trial and, thus, does not warrant reversal. (Cal. Const., art. VI, § 13; Evid. Code, § 353.)

III.

Impeachment of Jennifer Shelton

Defendant contends that the trial court erred in allowing testimony by Shelton that defendant had physically assaulted her "frequently"—on average once a week—during the six to seven months of their relationship. In our prior opinion in this appeal, we concluded that admission of this testimony was error, reasoning: "Defendant moved to exclude testimony by Jennifer Shelton as to his prior acts of domestic violence on her because the current trial pertained only to the death of Janika Price. He was convicted in the prior trial of battery on Jennifer Shelton based on the beating he inflicted immediately before Janika's death. The trial court, however, ruled that the evidence of prior abuse would be admissible to explain why Shelton changed her testimony between the preliminary examination and the first two trials.

"Shelton testified on direct examination at the current trial as follows: [Defendant] had physically assaulted her about once a week during the six or seven months they lived together. When she testified at the preliminary examination, her testimony, which was supportive of [defendant], was not totally truthful because she did not believe that [defendant] could do something that 'hateful.' She further testified that [defendant] had a 'temper.'

"[Defendant] correctly contends that this evidence was inadmissible on the ground stated. Reference to Shelton's preliminary hearing testimony was inadmissible hearsay. It was not admissible under Evidence Code section 1235 as a prior inconsistent statement because there was no inconsistency. Shelton admitted in her testimony at the current trial

that her preliminary hearing testimony was false. Thus, it would only have been admissible as a prior consistent statement under Evidence Code section 1236 if her credibility had been challenged, which it had not. (Evid. Code, §§ 1236, 791.) It was improper bootstrapping to introduce the otherwise inadmissible history of domestic violence for the purpose of explaining Shelton's preliminary hearing testimony which was inadmissible and irrelevant." (*People v. Johnson, supra*, A085450, typed opn. at p. 26.)

Although we have concluded this evidence was erroneously admitted, defendant has failed to demonstrate prejudice in the circumstances presented here. Shelton's testimony about past abuse was brief and without details. In contrast, properly admitted evidence of defendant's abuse of Shelton immediately before he killed Janika was graphically detailed and showed considerable brutality by defendant. That beating resulted from their argument over defendant's mistreatment of Janika and culminated in his kicking Shelton, knocking her down and kicking her again while she lay on the floor. The risk that the jury would conclude that defendant "was a bad man, and that he beat Janika in the same way that he beat her mother," was far more likely attributable to that detailed and graphic evidence than to Shelton's brief and general testimony that defendant had frequently abused her in the past.

Although the court allowed the jury to rely on the unspecified abuse as misdemeanor conduct bearing upon defendant's credibility as permitted by *People v. Wheeler* (1992) 4 Cal.4th 284, 290, that use of this evidence also paled in significance in light of evidence of defendant's *felony* conviction, which was properly admitted, and of his numerous admitted lies.

On the record here, we are convinced that it is not reasonably probable that exclusion of Shelton's testimony that defendant had repeatedly abused her in the past would have led to a result more favorable to defendant.

IV.

Testimony of Tammy Keller

We next address the prejudicial impact of the trial court's erroneous admission of evidence regarding defendant's trashing of his ex-wife's apartment two and one-half years before he killed Janika. We described the evidence and our conclusion that its admission was erroneous in our prior opinion in this appeal as follows:

"[Defendant] contends that the court erred in allowing Tammy Keller to testify on rebuttal about his trashing his ex-wife's apartment. Keller was the cousin of [defendant's] ex-wife, Holly Eastman, who was the mother of [defendant's] two sons. She testified that she was living with Holly and her two children on August 27, 1993, when [defendant] came over while Holly was not there. [Defendant] spoke to Holly on the telephone and argued with her. After that, [defendant] went on a rampage. He ripped the telephone out of the wall and urinated on the dirty dishes in the kitchen sink. [Defendant] picked up his son and carried him under his arm. He threw a fish tank through the window, broke the glass coffee table, and tried to throw the television through the window. During the course of this, [defendant] accidentally bumped the child's head on the door and on the television.

"The trial court ruled that Keller's testimony was admissible to impeach [defendant's] testimony that '[my two boys] knew I'm not going to let nothing happen to them. Any time they with they daddy, they know they're protected.' We agree with [defendant] that the evidence should have been excluded under Evidence Code sections 352 and 1101 in that its minor probative value was far outweighed by the prejudicial effect." (*People v. Johnson, supra*, A085450, typed opn. at pp. 27-28.)

Nevertheless, in light of the record as a whole, we believe the admission of this evidence did not result in a miscarriage of justice requiring reversal of the judgment.

As a threshold matter, we address the Attorney General's claim that defendant waived any error. Defense counsel successfully objected to the admission of all evidence concerning this incident during the prosecution's case-in-chief. He also argued against it's introduction on rebuttal, contending that defendant did not "open the door" by his

assertion that his sons knew they were protected when they were with him. Defense counsel further argued that, "[s]hould the court conclude [defendant] did open the door, . . . this information should be limited as to what can come in. . . ." He urged the court to "limit it . . . to the accounts or narrations concerning the child and not all of the other extraneous [Evidence Code section] 352 issues such as what Ms. Keller did to try and get the child back, being dragged down the road, because that defeats the purpose of this evidence being introduced in the first place. [¶] . . . [I]t's being introduced or asked to be introduced as it relates to the child and not Ms. Keller." The court agreed, ruling that the testimony would be limited "to testimony relating to what happened to the child." It ruled that Keller "can testify as to what happened to the child. She may not testify as to assaultive behavior as to her or her holding onto the car as he's driving away." In light of this ruling, it appears that counsel should have objected again when the prosecutor elicited evidence of events at the apartment before defendant actually grabbed his son. Nevertheless, it appears the parties understood the ruling to mean that evidence up to the point of Keller's chasing the car was to be admitted. In any event, we need not determine whether counsel waived objection to testimony as we have determined, in light of the entire record, that admission of Keller's testimony does not require reversal.

We have concluded that introduction of the entire version of what happened at the Keller apartment was error under Evidence Code sections 352 and 1101, because it was more prejudicial than probative. As recognized by the trial court when it refused to allow this evidence to be presented in the prosecutor's case-in-chief, such evidence is generally very prejudicial. Nevertheless, admission of a more limited version of this testimony would have been proper. Defendant admitted that he had "accidentally stepped on" his kids when they were underfoot. Asked how many times this had happened, he testified: "I don't know. Bumped into 'em a couple of times. I turn around and if I'm going out the door and I turn back around, they're right there on me trying to follow me. I mean, ain't like I did it on purpose or nothing. I just turned around." Keller's rebuttal testimony that defendant had come to her home where his sons were sleeping, and in an angry state grabbed his oldest son and "carried him like a football with his head in the

front," "knocked [the child's] head into the door frame" while trying to pass from the bedroom into the living room where he tried to throw the television set through the window, once again hitting the boy's head with the television at which point the boy stopped crying and closed his eyes, would have sufficed to rebut defendant's testimony without including the more inflammatory parts of the incident.

Immediately following Keller's testimony, the trial court read the following admonition: "[Y]ou just heard testimony with regard to the Defendant's treatment of his own children. That is being received to rebut his testimony with regard to his behavior toward his own children. All of this type of evidence . . . is not being received to show the Defendant is a person of bad character or has a propensity to commit crimes. It may be considered for the limited purposes for which it was received and no other purposes.

The jury was also instructed that other crimes evidence "may not be considered by you to prove that the Defendant is a person of bad character or that he has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show: [¶] . . . [¶] Acts of violence toward his own children, including the testimony of Ms. Keller regarding [defendant's older son] to rebut the Defendant's testimony regarding his behavior toward his own children. [¶] For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in this case. You are not to consider [it] for any other purpose."

The sole instance cited by defendant of the prosecutor referring to Keller's testimony during argument is in the context of the prosecutor's pointing out defendant's numerous lies: "It's a lie, just like the lie he told about his kids. 'My kids know I would never hurt them.' Really? Taking your kid and tossing him around and smacking his head, tossing up a television and knocking a kid in the head." This brief and limited reference to Keller's testimony stayed well within the limits of that evidence, which we have concluded would have properly been admissible on rebuttal. Although defendant argues the prosecutor did not tell the jury they should limit this evidence to credibility, and should not use it to judge defendant's character, the prosecutor was not required to do so. The judge twice had instructed the jury that it must limit its consideration of the

testimony "to rebut [his] testimony regarding his behavior toward his own children" and not to show him to be a person of bad character. The prosecutor properly limited his reference to Keller's testimony to challenge defendant's credibility regarding his treatment of his children.

Defendant has failed to prove that admission of this testimony resulted in a miscarriage of justice or that it was reasonably probable that but for its admission he would have received a more favorable result (*People v. Watson* (1956) 46 Cal.2d 818, 836), given that some limited testimony regarding this incident and defendant's knocking of his son's head against the door frame and against the television set as he tried to throw it out the window properly could have been admitted, that the jury was twice admonished that it could properly consider the evidence only to rebut defendant's testimony about his treatment of his own children, and that the prosecutor limited his use of the evidence to that which was properly admissible.

The strong forensic evidence that Janika was killed by an intentional and forceful blow to the chest, that she was the victim of child abuse, that the blow could not have been from defendant's accidentally stepping on her or from CPR, combined with other evidence of defendant's explosive violence toward Shelton on the night in question and as to his abusive treatment of Janika on other occasions, combined with his complete lack of credibility and the repeated impeachment of his version of events on the evening Janika was killed, taken together provide overwhelming evidence that defendant killed Janika with malice by an intentional blow to her chest. Admission of the Keller testimony as to the details his 1993 "rampage" was harmless error.

V.

The BB Gun Experiment

In our prior opinion in this appeal, we agreed with defendant's contention that the trial court erred "in allowing [O]fficer Krastof to testify that the bruise marks on Janika's face appeared similar to the marks caused by shooting a fellow officer with a BB gun." We reasoned: "A witness may not give expert testimony on an experiment without a showing that the witness has the necessary expertise. 'The proponent of experimental

evidence bears the burden of production and proof on the question whether such evidence rests on an adequate foundation.' (*People v. Bonin* (1989) 47 Cal.3d 808, 847.) 'Admission of such evidence depends upon proof of the following foundational items: (1) The experiment must be relevant; (2) it must have been conducted under at least substantially similar, although not necessarily absolutely identical, conditions as those of the actual occurrence; (3) the qualifications of the individual testifying concerning the experimentation must be demonstrated with some particularity; and (4) evidence of the experiment will not consume undue time, confuse the issues, or mislead the jury.' (*People v. Turner* [(1994)] 8 Cal.4th [137,] 198.) [¶] Here, there was no showing that [O]fficer Krastof had any training, experience, or expertise regarding BB gun strike marks. Nor was there any showing of expertise to qualify him to given an opinion on whether an injury on an adult's arm resembles another injury on a child's face." (*People v. Johnson, supra,* A085450, typed opn. at pp. 28-29.)

Defense counsel objected to this evidence initially on grounds of lack of foundation. The court *sustained* the objection. The district attorney purported to lay the foundation for the officer's opinion by asking Krastof how he had tested the gun. Defense counsel *did not object* that the foundation was insufficient. Rather, after the lunch break, defense counsel moved for a mistrial "on prosecutorial misconduct, specifically, failure to provide discovery" about the BB gun test and the comparison with the bruising on Janika's face. The district attorney contended the information had been provided to defense counsel in discovery. After checking, defense counsel conceded, "Mr. Brown is correct in that it is in the police report" and that the police report was provided to him. Defense counsel did not withdraw his mistrial motion, but put it "on delay until Dr. Peterson's testimony" if it turned out that, unbeknownst to the defense, photographs of the injuries had been provided to Dr. Peterson and he concurred with Krastof's analysis. The court suggested defense counsel talk to Dr. Peterson and determine "if he wishes to renew the motion." The court concluded: "Right now I'll show it this way, Mr. Cannon: The motion is withdrawn unless you reraise it with me." Defense counsel responded: "That's a fine characterization." Counsel failed to object to

the adequacy of the foundation as purported to be laid, thus waiving that objection, and in effect withdrew and never renewed his motion for mistrial. Defendant has waived the error.

In order to forestall a claim of ineffective assistance of counsel, we address the issue of prejudice. Had the issue been properly preserved, defendant has failed to show prejudice. Defendant argues only that the "evidence of the supposed BB injury was so powerful. For this evidence would clearly cause the jury to believe that if [defendant] was a bad enough man to shoot the child with a BB gun, then surely he was a bad enough man to murder her." There was no assertion by the prosecution that *defendant* had shot Janika with a BB gun, and Dr. Peterson did not speculate that any of the bruises he identified could have come from a BB gun. He did not even say that the facial bruises could have been suffered on the night in question. The prosecutor never referred to this testimony in his closing argument. Krastof never held himself out as an expert in this area, and there is no reason to believe the jury gave the testimony undue weight. As for defendant's claim that the jury could use this evidence to speculate that defendant was "a bad enough man to murder [Janika]," Dr. Peterson's expert testimony that the child had been the victim of child abuse, the evidence concerning defendant's punching Janika in the stomach, and Shelton's testimony regarding defendant's treatment of Janika would have been far more powerful on that point.

Viewing the record as a whole, defendant has failed to show that, but for the erroneous admission of Krastof's testimony that the bruises on Janika's face looked similar to those made by the BB gun on the other officer's arm, he would have received a more favorable result at trial. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

VI.

Cumulative Error Claim

Finally, defendant contends that the cumulative effect of the trial court's errors requires reversal of the judgment. Based on our review of the entire record, defendant's contention fails. We have reviewed defendant's claims both individually and collectively. Even when we consider the few instances of error together, we remain

convinced beyond a reasonable doubt that they had no bearing on the outcome and did not render defendant's trial fundamentally unfair. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Defendant was entitled to a trial "in which his guilt or innocence was fairly adjudicated." (*People v. Hill* (1998) 17 Cal.4th 800, 844.) He received such a trial. Unlike *People v. Hill*, in which "outrageous and pervasive misconduct" by the prosecutor led the court to reverse the judgment in a trial that was "rife with serious error" (*id.* at p. 815), we have found no instance of prosecutorial misconduct. Nor can we say the current trial in this case was "rife with serious error."

Disposition

The judgment is affirmed. The petition for writ of habeas corpus is denied.

Kline, P.J.

We concur:

Haerle, J.

Lambden, J.

APPENDIX E

Court of Appeal, First Appellate District, Division Two - Nos. A085450/A106431
S127602

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

JAY SHAWN JOHNSON, Defendant and Appellant.

Petition for review DENIED.

Kennard, J., is of the opinion the petition should be granted.
Werdegar, J., was absent and did not participate.

SUPREME COURT
FILED

OCT 2 0 2004

Frederick K. Ohlrich Clerk

DEPUTY

Chief Justice

RESPONDENT'S BRIEF IN SUPPORT OF PETITIONER

ORIGINAL

ORIGINAL

No. 04-6964

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
NOV 16 2004
OFFICE OF THE CLERK

JAY SHAWN JOHNSON,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

BRIEF OF RESPONDENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether to establish a prima facie case under *Batson v. Kentucky*, 476 U.S. 79 (1986), the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias.

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IN THE SUPREME COURT OF THE UNITED STATES

No. 04-6964

JAY SHAWN JOHNSON,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

OPINION OR JUDGMENT BELOW

The former opinion of the California Court of Appeal reversing the judgment (Pet. App. A) is unofficially reported at 105 Cal. Rptr. 2d 727. The opinion of the California Supreme Court reversing the judgment of the court of appeal (Pet. App. B) is reported at 30 Cal. 4th 1302, 71 P.3d 270, 1 Cal. Rptr. 3d 1. The opinion of this Court dismissing the case for want of jurisdiction (Pet. App. C) is reported at 541 U.S. ___, 124 S. Ct. 1833, 158 L. Ed. 2d 696. The opinion of the court of appeal affirming the judgment (Pet. App. D) is not reported. The order of the California Supreme Court denying review (Pet. App. E) is not reported.

JURISDICTION

The order of the California Supreme Court denying review was entered October 20, 2004. The petition for writ of

certiorari was filed October 22, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTION PROVISION INVOLVED

The Fourteenth Amendment provides, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

STATEMENT

1. This Court previously granted certiorari to answer the question presented above in No. 03-6539. The case was dismissed after oral argument for want of jurisdiction. Pet. App. C.

2. Petitioner, an African-American, murdered the Caucasian nineteen-month-old daughter of his girlfriend. Pet. App. B 1306.[1]

3. During jury selection, the prosecutor exercised twelve peremptory challenges, three of which were used to challenge all of the African-American prospective jurors. Pet. App. B 1307. Citing *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748 (1978), which held "'that the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates' the California Constitution," Petitioner twice moved to quash the venire based on two of the challenges. Pet. App.

---

1. The Appendix is not consecutively numbered. Appendix page citations are therefore to the page of the opinions as provided by the court or the reporter.

B 1307, 1309. Applying *Wheeler*'s requirement that the objector establish a prima facie case by showing a "strong likelihood" of group bias, the trial court denied the motions. Pet. App. B 1307-08.

4. A divided panel of the California Court of Appeal reversed. Pet. App. A. Adopting the analysis of the Ninth Circuit Court of Appeals in *Wade v. Terhune*, 202 F.3d 1190 (9th Cir. 2000), the state appellate court concluded that the "strong likelihood" standard adopted in *Wheeler* and applied by the trial court violated *Batson v. Kentucky*, 476 U.S. 79 (1986), which requires the objector to raise "'an inference of discriminatory purpose.'" Pet. App. B 1306, 1308; *see* Pet. App. A 5-7. "Based primarily on its own comparison of answers the challenged jurors gave with answers of nonchallenged jurors, the court concluded that 'a prima facie case of group bias was established and that the judgment must therefore be reversed.'" Pet. App. B 1308. Justice Haerle dissented on all points. Pet. App. B 1308; Pet. App. A 1-12 (dissenting op.).

5. The California Supreme Court reversed the judgment of the court of appeal. The supreme court "conclude[d] that *Wheeler's* terms, a 'strong likelihood' and a 'reasonable inference,' refer to the same test, and this test is consistent with *Batson*. Under both *Wheeler* and *Batson*, to state a prima facie case, the objector must show that it is

more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias." Pet. App. B 1306. The court "also conclude[d] that *Batson* does not require state reviewing courts to engage in comparative juror analysis for the first time on appeal." Pet. App. B 1306. The supreme court upheld "the trial court's finding that defendant failed to establish a prima facie case that the prosecutor used his peremptory challenges improperly." Pet. App. B 1306.

Two justices would have affirmed the state court of appeal based on their belief that *Wheeler*'s "strong likelihood" standard is inconsistent with *Batson*. Pet. App. B 1328-29, 1333-41.

6. This Court granted certiorari, limited to the question presented above. 124 S. Ct. 817. After argument, the case was dismissed because the state judgment was not final. Pet. App. C.

7. On remand, the Court of Appeal of California affirmed the judgment of conviction, Pet. App. D, and the Supreme Court of California denied review, Pet. App. E.[2/]

---

2. Although styled as a petition for certiorari to the Supreme Court of California, it appears the petition more properly should seek certiorari to the Court of Appeal of California, First Appellate District. "Should the higher court decline to exercise its authority, the judgment of the intermediate court rather than the order of refusal by the higher court is the judgment reviewable under § 1257." Robert L. Stern et al., *Supreme Court Practice* 167 (8th ed. 2002). Respondent has so styled its caption.

ARGUMENT

1. Respondent previously acquiesced to a grant of certiorari in No. 03-6539. Respondent continues to agree with Petitioner that the question presented warrants this Court's review. The decisions of the California Supreme Court and the Ninth Circuit squarely conflict on the extent of the burden on a party objecting under *Batson*. *See* Sup. Ct. R. 10(b). The Ninth Circuit continues to review *Batson* claims de novo based on its conclusion that the test recognized by the California Supreme Court below is "'impermissibly stringent in comparison to the more generous *Batson* "inference" test.'" *Paulino v. Castro*, 371 F.3d 1083, 1090 (9th Cir. 2004).

This conflict concerns a question of national importance—the standard by which trial courts evaluate claims that peremptory challenges to prospective jurors by civil and criminal litigants violate the Equal Protection Clause. And the conflict on that question between the California Supreme Court and the federal appellate court for the circuit in which California is located poses a tremendous burden on the State. Its judgments in criminal cases are denied the benefit of the presumption of correctness and of the deferential standard of review mandated by the Antiterrorism and Effective Death Penalty Act of 1996. *See Paulino*, 371 F.3d at 1090.

The current split of authority, if unresolved, will (1) lead to mistaken findings by federal habeas courts under

Batson; (2) sap unnecessarily California's strained resources as it engages in collateral litigation that would be avoided by application of the proper standard, *see, e.g., Fernandez v. Rode*, 286 F.3d 1073 (9th Cir. 2002) (finding prima facie case in 2002 and remanding for evidentiary hearing concerning 1995 trial); and (3) create unacceptable risks that valid state judgments (including death penalty judgments long since final in state court but still pending review on federal habeas corpus) will be erroneously vacated.

The Court should therefore grant certiorari to resolve the conflict between the Supreme Court of California and the Ninth Circuit.

2. Petitioner reads the question presented as including not only the objecting party's prima facie burden in a *Batson* hearing, but also two other issues. Neither is included.

a. Because the question uses the word "unexplained" in the phrase "must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias," Petitioner asserts that "[w]ritten speculation, after the fact, on appeal . . . as to possible justifications is not proper." (Pet. 8.) He believes that doing so "raises the prima facie threshold to an almost unreachable burden." (Pet. 7.) Petitioner asserts that "California courts distort the entire Batson process when, at the prima facie stage, they search the record for possible race-neutral reasons why someone might have challenged a

juror, without any evidence that that [*sic*] the prosecutor actually employed such a reason." (Pet. 11.)

Respondent confronted a similar argument when the case was previously before the Court. California declined to address the argument, reasoning, "The *types* of evidence courts consider in determining *Batson* motions is unrelated to the degree of *persuasiveness* of the objector's evidence." (Resp't's Br. on the Merits (No. 03-6539) 46 n.12.) That is still true.

Moreover, Petitioner's argument conflates and confuses the burden of persuasion on the objector in the trial court (which is the subject of the question presented) and the objector's obligation on appeal to show that the trial court erred (which is not the subject of the question presented). There is no obligation in the appellate court for "the objector [to] show that it is more likely than not that the other party's peremptory challenges, if unexplained, were based on impermissible group bias." That obligation is a *trial* obligation, not an *appellate* obligation. On appeal, the objector must show *error*. *See, e.g., People v. Griffin*, 33 Cal. 4th 536, 555 n.5, 93 P.3d 344, 356 n.5 (2004) (failure of prima facie case reviewed for substantial evidence); *Tolbert v. Page*, 182 F.3d 677, 685 (9th Cir. 1999) (en banc) (prima facie case ruling reviewed for clear error on direct review or with presumption of correctness on habeas).

A rule that a trial court cannot consider information available to it through its own observations (such as a juror's hostile tone) and that an appellate court cannot review the record as a whole and rely on information in it (such as a juror's hostile answer on a written questionnaire) to affirm a presumptively valid judgment would be contrary to ordinary practice. *See, e.g., Hernandez v. New York*, 500 U.S. 352, 369 (1991) (plurality opinion) ("'[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous'") (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985)). As framed, the question presented does not encompass issues of the types of evidence the trial court may consider or issues of the modes of appellate review. Should the Court wish to reformulate the question to include those matters, Respondent will explain the flaws in Petitioner's argument.

b. As he did in his merits briefing in No. 03-6539, Petitioner attempts to expand the question presented to include the issue of comparative juror analysis. (*Compare* Pet'r's Br. on the Merits 43 & n.30 (No. 03-6539) *with* Pet. 8.) California adheres to its previously articulated position that the propriety of using comparative analysis for the first time on appeal is not within the question presented. (*See* Resp't's Br. on the Merits 46 n.12 (No. 03-6539).)

In No. 03-6539, Petitioner sought certiorari on whether

comparative analysis is required. (Pet. i (No. 03-6539).) Although Respondent supported Petitioner in that request (*see* Br. of Resp't in Supp. of Pet. for Cert. i, 11-14 (No. 03-6539)), the Court did not grant certiorari on that question. Should the Court wish to reformulate the question presented to include the question of whether appellate courts must engage in comparative juror analysis for the first time on appeal, Respondent will address that issue.

CONCLUSION

Accordingly, Respondent respectfully requests that the Court grant the petition for certiorari.

Dated: November 15, 2004

Respectfully submitted,

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November 16, 2004

Honorable William K. Suter, Clerk
United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

RE: *Jay Shawn Johnson v. State of California*
No. 04-6964

Dear Mr. Suter:

Enclosed are an original and 10 copies of Brief of Respondent in Support of Petition for Writ of Certiorari for filing in the above-entitled matter, our "Attorney General Office Copy," and the Certificate of Service by Mail. Please return our endorsed-filed "Attorney General Office Copy" to this office in the enclosed postage-paid envelope.

Thank you.

Sincerely,

SETH K. SCHALIT
Supervising Deputy Attorney General

For BILL LOCKYER
Attorney General

SKS:jkh
Enclosures:
12 copies of Brief
Original & 4 copies of Certificate of Service by Mail
1 Postage Paid Envelope

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No. 04-6964

IN THE

SUPREME COURT OF THE UNITED STATES

JAY SHAWN JOHNSON, *Petitioner*,

v.

STATE OF CALIFORNIA, *Respondent*.

CERTIFICATE OF SERVICE BY MAIL

I, SETH K. SCHALIT, a member of the Bar of this Court, hereby certify that on this 16th day of November, 2004, three copies of the Brief of Respondent in Support of Petition for Writ of Certiorari in the above-entitled case were mailed, first class postage prepaid, to Stephen B. Bedrick, Attorney at Law, 1970 Broadway, Suite 1200, Oakland, CA 94612, (Tel: (510) 452-1900), counsel for the petitioner herein. I further certify that all parties required to be served have been served.

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FILED
NOV 19 2004
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No. 04 - 6964

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 2004

JAY SHAWN JOHNSON, Petitioner

vs.

STATE OF CALIFORNIA, Respondent

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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I.

THE PARTIES AGREE THAT CERTIORARI SHOULD BE GRANTED

Petitioner Jay Shawn Johnson is pleased that Respondent state of California agrees with him this year, as it did last year in case no. 03-6539, that certiorari should be granted. Petitioner concurs with Respondent that there is a direct and continuing conflict between the California Supreme Court and the federal Court of Appeals for the Ninth Circuit on the issues presented here. The degree of conflict is substantial. Petitioner concurs with Respondent that the conflict warrants a grant of certiorari. Such agreement does not often arise in a criminal case.

Respondent's memorandum in support of grant of certiorari disagrees with Petitioner as to the meaning of the term "if unexplained" in the text of the "Question Presented." A dispute about the meaning of a phrase within the Question Presented is surely within the scope of the Question Presented. This dispute should not interfere with the grant of certiorari. It can be resolved on merits briefing.

The Question Presented reads:

> Whether to establish a prima facie case under Batson v. Kentucky, 476 U.S. 79 (1986), the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on that impermissible group bias?

This is the identical Question Presented as in the prior case, Johnson v. California, case no. 03-6539. The text of that Question Presented was drafted by the Court a year ago, in November, 2003, in lieu of the Questions Presented submitted by Petitioner.

The Question Presented inquires into both the strength of the evidence needed to establish a prima facie case, and whether, in evaluating the prima facie case, possible explanations should be considered. The Question Presented is not, as the state suggests, merely limited to the degree

of persuasiveness of the objector's evidence at step one of Batson analysis; it also encompasses the question about whether or not a particular type of evidence -- proposed or hypothesized explanations -- should be considered at step one.

At step one of Batson analysis the trial court considers the sufficiency of the objector's showing "if unexplained," meaning before an explanation is given, because the very purpose of determining if there is a prima facie case is to decide whether to require the challenger to proffer an explanation. It makes no sense, and is contrary to Hernandez v. New York, 500 U. S. 352, 359 (1991), for a trial court to find no prima facie case, and excuse the challenger from giving a reason, merely because the court thinks that it might be able to articulate a race-neutral explanation.

It makes even less sense, and is similarly contrary to Hernandez, to reject a prima facie case because an appellate lawyer, or an appellate judge, is able to articulate an explanation of his or her own, after the fact, for the disputed peremptory. It is irrelevant whether the trial judge, or an appellate lawyer, or an appellate judge, if he had been trial counsel for a party, might have used a peremptory challenge against a juror. If the exercise of that challenge was in fact motivated by impermissible motives of the specific prosecutor in this case, that challenge violated the constitution, regardless of whether a third party, after the fact, on paper, might be able to argue that the state's actions could satisfy a rational basis test.

These principles equally apply to analysis at the trial court level and to review at the appellate level.

For these reasons, the Question Presented is correctly stated.

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///

///

CONCLUSION

Petitioner respectfully requests that the Court grant certiorari this year, to complete the work which was begun last year in case no. 03-6539.

Dated: November 19, 2004

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No. 04-6964

In The
Supreme Court of the United States

JAY SHAWN JOHNSON,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of California

JOINT APPENDIX

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	Sara Edwards	72	219-221 22
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RELEVANT DATES IN PROCEEDINGS BELOW[1]

April 23, 1996	Information filed, Contra Costa County Superior Court (Martinez, California), case #96-0691-4: charging Petitioner with Count I, murder of Janika Price, California Penal Code §187; Count II, corporal injury of cohabitant, Jennifer Shelton, Penal Code §273.5; Count III, assault resulting in death of child, Penal Code §273ab (same victim as Count I, Janika Price)
August 6, 1996	Mistrial declared in first jury trial
September 23, 1996	Second Jury trial begins
October 10, 1996	Jury verdicts in second jury trial: not guilty of first degree murder; guilty of second degree murder; guilty of injury of cohabitant; guilty of assault on child resulting in death
July 27, 1998	Decision by California Court of Appeal, First District, Div. 2 in case #A076360: reversal of convictions for second degree murder and assault on child resulting in death because of instructional error regarding concurrent causes; affirmance of conviction of assault on cohabitant
November 24, 1998	Third jury trial begins
December 2-3, 1998	Voir dire of jurors

[1] There is no official trial court docket sheet.

December 11, 1998	Jury verdict in third jury trial: guilty of second degree murder and guilty of assault on child resulting in death
April 5, 2001	Decision by California Court of Appeal, First District, Div. 2 in case #A085450: reversal of convictions because of racial discrimination in jury selection, opinion published as *People v. Johnson* (2001) 88 Cal.App.4th 318
June 30, 2003	Decision by California Supreme Court, reversing decision of Court of Appeal and remanding for further proceedings, published as *People v. Johnson* (2003) 30 Cal.4th 1302
September 22, 2003	Petition for certiorari filed at U.S. Supreme Court
December 1, 2003	Petition for certiorari granted, case no. 03-6539
May 3, 2004	Order by United States Supreme Court dismissing case #03-6539 for lack of jurisdiction because of lack of final judgment, *Johnson v. California*, 541 U.S. ___, 124 S.Ct. 1833 (2004)
August 5, 2004	Decision by California Court of Appeal, First District, Division 2, in case #A085450, *People v. Johnson*, affirming conviction, and in case #A106431, *In re Johnson on habeas corpus*, denying petition (unpublished opinion)

October 20, 2004	Order by California Supreme Court, case no. S127602, denying review
January 7, 2005	New petition for certiorari granted, case no. 04-6964

IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF CONTRA COSTA

BEFORE THE HONORABLE
PATRICIA SEPULVEDA, JUDGE

DEPARTMENT NO. 16

- - - oOo - - -

PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff,	)	No. 960691-4
vs.	)	**JURY SELECTION**
JAY SHAWN JOHNSON,	)	
Defendant	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

DECEMBER 2, 1998

APPEARANCES:

FOR THE PEOPLE: GARY T. YANCEY
District Attorney
Contra Costa County
Martinez, CA 94553
By: **David Brown**, Esq.
Deputy District Attorney

FOR THE DEFENDANT: CHARLES JAMES
Public Defender
Contra Costa County
Martinez, CA 94553
By: **Patrick Cannon**, Esq.
Deputy Public Defender

Reported By: LINDA S. MacFARLANE
Official Court Reporter, Certificate No. 7813

* * *

[222] MR. BROWN: That's fine.

(Whereupon a brief recess was taken)

THE COURT: Let the record reflect we're outside the presence of the prospective jurors.

Mr. Cannon, you had a motion you wished to make?

MR. CANNON: At this time, outside the presence of the jurors, on behalf of Mr. Johnson, I would like to bring at this time a *Wheeler* motion. The basis of the motion is that I believe we are now through juror number seventy-two, I believe. And during the selection process today, we have had three African-Americans – specifically, three African-American women – that were selected into the box among the twelve. In each specific instance, Mr. Brown for the District Attorney's office exercised a peremptory challenge to eliminate those three individuals.

More specifically, I guess this concerns Sarah Edwards, the last individual who was eliminated by the People. There was no follow-up questions asked by Mr. Brown. The questionnaire that Ms. Edwards – I'm sorry – submitted to this Court did not appear to reveal any specific items that would cause defense counsel at least to believe that the peremptory challenge was exercised in anything but for either gender and/or race. Since I am bringing the *Wheeler* motion, I argue that it was brought for race.

The response – the only follow-up questions that the Court asked Ms. Edwards concerned the incident involving her parent. I believe her response to the Court [223] was

her parent was arrested for robbery over three years ago. According to her questionnaire, she would have been five or six at the time. She informed us that she had no independent recollection of that incident.

The other responses that she had, she said despite the emotional nature of this offense, she would set aside her emotions to try and be fair and impartial, tending to indicate that she would be more prone to sway with the prosecution, due to the nature of these charges, than the defense point of view.

So I would argue that under *Wheeler* there was no basis that defense counsel can see for peremptory challenge other than Ms. Edwards' racial identity. According to my argument, she appeared to be African-American.

THE COURT: The Court, based on the record that's been made, would find that there's not been shown a strong likelihood that the exercise of the peremptory challenges were based upon a group rather than an individual basis. The Court has to start from the position of a premise that the exercises of the peremptory challenges were based on constitutional grounds.

However, I would indicate that we are very close, Mr. Brown.

With that, I want to let you know that I've gotten a letter that we're making reference to from Mr. Boushey's employer saying he has a hardship. I don't remember him raising that issue before, but we have to talk to him about it now.

* * *

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF CONTRA COSTA

BEFORE THE HONORABLE
PATRICIA SEPULVEDA, JUDGE

DEPARTMENT NO. 16

[Caption Omitted In Printing]

* * *

[101] DECEMBER 3, 1998

MORNING SESSION, 9:30 A.M.

- - - o0o - - -

(Whereupon the following pages, 101-A-105 were sealed.)

[101A] DECEMBER 3, 1998

- - - o0o - - -

SEALED PROCEEDINGS

THE COURT: Let the record reflect we're outside the presence of the prospective jurors. The first thing we need to do is put on the record I believe that you wanted to make another *Wheeler* motion, Mr. Cannon.

MR. CANNON: Yes, Your Honor.

THE COURT: We had no opportunity to do that yesterday so we reserved it to this morning.

MR. CANNON: Yes, Your Honor.

We would like to bring another *Wheeler* motion.

Second, on behalf of Jay Johnson, after selection I believe of juror number seventy-two, Sarah Edwards, at

that time the Defense counsel brought a motion on the position that prior to Sarah Edwards being placed among the twelve prospective jurors, the District Attorney had exercised his peremptory challenge and removed every African-American placed. Sarah Edwards was the third African-American placed among the twelve.

Mr. Brown at that time continued – or used his peremptory at that time to remove Ms. Edwards, the third African-American.

After that, we came to juror number eighty-eight, Ruby Lanere, the fourth African-American to be placed in the – among the twelve prospective jurors. And after the voir dire, Mr. Brown again used his peremptory [101A-1] challenge to remove the fourth among four African-Americans

* * *

[102] placed among the twelve.

It's my intention that the exercise of the peremptory challenges in this way showed or reflected a systematic attempt by the prosecution to exclude African-Americans from this jury panel. And on that, Your Honor, we make the basis of our *Wheeler* motion.

THE COURT: And as I had indicated yesterday when we had the *Wheeler* motion after juror number seventy-two, I had indicated that the Court, based on the record at that time, was not making a prima facie finding of the peremptory challenges being exercised based on group bias rather than individual bias.

With regard to, specifically, Ms. Lanere, the additional juror challenged and subject, in part, of this latest

Wheeler motion, the Court will note that the Court had concerns with regard to her qualifications in this matter based upon her answers on the questionnaire; specifically, the Court had noted that she had a sister who had had drug charges, although her answers in follow-up verbally were such that the Court would not have found that the issues were such to lead to a challenge for cause. May be sufficient to justify a peremptory challenge by the People.

Also, with regard to her answers generally on the questionnaire itself, there was an indication that she had difficulty understanding some of the issues, and specifically, her last response which was somewhat rambling on the questionnaire indicated that she herself felt that she had difficulty understanding things. Again, her verbal [103] responses here in court were such that I would not have granted a challenge for cause on that basis, but the Court felt that the answers on the questionnaire were sufficient that they certainly would have justified a peremptory challenge by either side, frankly, based upon the concerns about her ability to understand the proceedings.

With regard to the other jurors previously challenged, Mr. Cannon, as you indicated, the People had challenged I think every black and every black female juror that made it into the box. I believe one additional African-American was excused by the Court previously for a hardship. However, the Court will note that out of the twelve peremptory challenges used by the People selecting the jury now seated, four of those were the ones referring to challenges exercised against African-American women. Other peremptory challenges were exercised against all other types of groups, including white women and white men as well.

Going through, as an example, Ms. Edwards' questionnaire, the juror challenged previously and the subject of the prior *Wheeler*, caused the Court concern, including the answer on question thirty that she gave verbally here in court that she had not included in her questionnaire; a parent had a robbery or arrest, even though that was a number of years ago, thirty years ago. Her answers on the record were not as such that I would have granted a challenge for cause. Certainly, they could justify a challenge by the People.

She expressed on the record that she didn't [104] know if she could be fair. Her verbal follow-up responses were not as such that I would have granted a challenge for cause. And also based upon the answers with regard to question sixty-three Section 788, her emotions and feelings, again, her answers were such that they may have caused concern for either side. Even though the answers tend to lean in the favor of the prosecution in the case, neither side would want a juror deciding a case based upon emotions, rather than the facts and the evidence.

With regard to Ms. Edwards, the Court felt there was sufficient reason, given her overall answers to justify – excuse me Ms. Leffall, to justify the exercise of the peremptory challenge.

I think I may have mixed up the jurors again.

MR. BROWN: I think so.

THE COURT: The question about the parent and the 211 was Ms. Edwards. I spoke correctly the first time.

With regard to Ms. Leffall and Ms. Lanere –

MR. BROWN: May I say one thing? I don't think Ms. Leffall was African-American.

THE COURT: She indicates actually she was Indian on the front of the questionnaire.

MR. BROWN: Right.

THE COURT: Sometimes our assessment of race is not the same as self assessment.

With regard to Ms. Lanere, who did indicate that she was black or an African-American woman, again, on her questionnaire I had gone through the various questions [105] and answers here. In summary, with regard to the jurors, while the Court would not grant the challenges for cause, there were answers of the – at least on the questionnaires themselves such that the Court felt that there was sufficient basis for the peremptory challenge.

Even with the addition of Ms. Lanere, the Court will not find a prima facie case. The People are exercising challenges based on group bias, rather than individual bias.

However, having said that, if you wish to make a further record, Mr. Brown, you may do so at this point.

MR. BROWN: To augment the record – no, at this point, no. Nothing further.

THE COURT: Anything else with regard to that issue, Mr. Cannon?

MR. CANNON: Nothing further, Your Honor.

(Whereupon, the following proceedings were held in open court)

SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE COUNTY OF CONTRA COSTA

DEPARTMENT 16
HON. PATRICIA K. SEPULVEDA
JIM ALLISON, BAILIFF

DATE: DECEMBER 2, 1998
L. MacFARLANE, REPORTER
N. FILARDO, COURT CLERK

PEOPLE OF THE STATE OF CALIFORNIA, **DEP. D.A.: DAVID BROWN**

VS.

JAY SHAWN JOHNSON, **DEP. P.D.: PATRICK CANNON**

DEFENDANT.

ACTION NO.: 960691-4

NATURE OF PROCEEDINGS: **JURY TRIAL – DAY THREE**

9:00 a.m. The matter comes on calendar for regularly scheduled Jury Trial on December 2, 1998. The People are represented by Deputy District Attorney David Brown and the Defendant appears, in custody, with his counsel, Public Defender Patrick Cannon.

Outside the presence of the jury panels, counsel stipulate to excuse for cause the following jurors: Jurors #5, #15, #17, #43, #51, and #93. Jurors #65 is deferred.

The jury panels return to the courtroom. Twelve jurors are seated in the jury box. The Court begins with voir dire. The following jurors are challenged for cause: Jurors #1, #12, #2, #7, #14, #16, #25, #26, #36, #38, #39, #45, #46, #54, #57, #64, #71, #73, #74, #82 and #86.

10:45 a.m. The Court takes its morning break.

11:00 a.m. Outside the presence of the jury panels, counsel stipulate that the Exhibits may be returned to the People so that they can organize the Exhibits.

11:05 a..m. The jury panels are present. The Court continues with voir dire. The following juror is deferred: Juror #67. Counsel stipulate for cause to excuse Juror #79.

12:00 noon The Court takes its lunch recess.

1:30 p.m. All parties and the jury panels present, the Court continues with voir dire.

Peremptory challenges are exercised. The following jurors are excused by the People: Jurors #3, #40, #48, #33, #58, #60, #55, #72, #77, #80, #19, and #88. The following jurors are excused by the Defense: Jurors #29, #24, #11, #37, #35, #8, #49, #18, #52, #22, #59, #62, #69, #75, #76, and #87.

2:55 p.m. The Court takes its afternoon break.

3:05 p.m. Outside the presence of the jury panels, the Defense makes a *Wheeler* motion. After argument of counsel, the motion is denied.

3:10 p.m. The jury panels are present. The Court continues with voir dire.

4:13 p.m. The following jurors are selected without objection and are duly sworn to try this cause: Jurors #63, #20, #47, #4, #6, #78, #50, #10, #41, #89, #42, and #81.

The jury admonished and excused to Thursday, December 3, 1998 at 9:30 a.m. for further jury trial.

Counsel and the Defendant are directed to return on Thursday, December 3, 1998 at 9:00 a.m. for further jury trial.

The Defendant is remanded.

KEN TORRE, SUPERIOR COURT
CLERK OF THE COURT

/s/ N. Filardo
N. FILARDO, COURT CLERK

SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE COUNTY OF CONTRA COSTA

DEPARTMENT 16
HON. PATRICIA K. SEPULVEDA
JIM ALLISON, BAILIFF

DATE: DECEMBER 3, 1998
L. MacFARLANE, REPORTER
N. FILARDO, COURT CLERK

PEOPLE OF THE STATE OF CALIFORNIA, **DEP. D.A.: DAVID BROWN**

VS.

JAY SHAWN JOHNSON, **DEP. P.D.: PATRICK CANNON**

DEFENDANT.

ACTION NO.: 960691-4

NATURE OF PROCEEDINGS: **JURY TRIAL – DAY FOUR**

9:00 a.m. The matter comes on calendar for regularly scheduled Jury Trial on December 3, 1998. The People are represented by Deputy District Attorney David Brown and the Defendant appears, in custody, with his counsel, Public Defender Patrick Cannon

Outside the presence of the jury, the Defense makes a *Wheeler* motion. After argument of counsel, the motion is denied.

The Court and counsel review in limine motions previously discussed. With respect to Jennifer Shelton's testimony, counsel may ask general questions but no specific questions with respect to domestic violence. The witness is to

be admonished. Ms. Shelton may testify with respect to prior incidents.

9:35 a.m. The jury is now present. The Court continues voir dire with respect to the selection of alternates. The following jurors are challenged for cause: Jurors #90, #99 #103 and #106.

Peremptory challenges are exercised. The following juror is excused by the People: Jurors #97. The following juror is excused by the Defense: Juror #105.

10:00 a.m. The following jurors are selected as alternates without objection and are duly sworn as the alternates: Jurors #100, #96 and #107.

The Court gives preliminary jury instructions. The Clerk reads the Information.

The jury is excused to take a break.

Outside the presence of the jury, the following stipulations are entered into: Counsel stipulate that all parties will be present each day and that the jury need only be admonished in full once a day.

10:45 a.m. All parties and the jury present, the People present their opening statement.

11:00 a.m. Defense presents his opening statement.

11:10 a.m. People call Jennifer Shelton, who is sworn and testifies herein.

People present for identification the following Exhibit:

EXHIBIT 4: PHOTO BOARD CONTAINING THREE PHOTOS OF JENNIFER SHELTON (A-C)

People move to admit Exhibit 4 into evidence; there being no objection, People's Exhibit 4 is admitted into evidence and published to the jury.

People present for identification the following Exhibit:

EXHIBIT 6: PHOTO OF JENNIFER SHELTON'S FOOT

People move to admit Exhibit 6 into evidence; there being no objection, People's Exhibit 6 is admitted into evidence and published to the jury.

People present for identification the following Exhibits:

EXHIBIT 8: JENNIFER SHELTON'S STATEMENT TO POLICE OFFICERS

EXHIBIT 9: BOARD WITH DIAGRAM OF APARTMENT

EXHIBIT 10: JENNIFER SHELTON'S STATEMENT TO SAN PABLO POLICE

11:55 a.m. The Court takes its noon recess.

1:30 p.m. All parties and the jury present, Jennifer Shelton takes the stand and resumes her testimony.

People present for identification the following Exhibits:

EXHIBIT 11: PHOTOGRAPH OF GUN

EXHIBIT 12: PHOTOGRAPH OF GUN

1:40 p.m. Defense conducts cross-examination of the witness. People conduct re-direct examination. Defense conducts re-cross examination. The witness is excused, subject to recall.

The jury is admonished and excused to Friday, December 4, 1998 at 10:00 a.m. for further jury trial.

Outside the presence of the jury, the Court and counsel review transcripts of the Defendant's interview with police on February 20, 1996. The Court rules that page 8, lines 14 through line 21, are not admissible. The Court further rules that page 26, lines 14 through 17, page 28, lines 5 through 9, and page 40, lines 6 through 11, are not allowed. Counsel agree to keep out page 39, lines 5 through 8.

Counsel and the Defendant are directed to return on Friday, December 4, 1998 at 9:30 a.m. for further jury trial.

The Defendant is remanded.

KEN TORRE, SUPERIOR COURT
CLERK OF THE COURT

/s/ N. Filardo
N. FILARDO, COURT CLERK

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF CONTRA COSTA

BEFORE THE HONORABLE
PATRICIA SEPULVEDA, JUDGE

DEPARTMENT NO. 16

[Caption Omitted In Printing]

December 2, 1998

* * *

[130] THE CLERK: Clodette Turner.

THE COURT: Take the seat that Mr. Lunardi just left.

Good morning.

MS. TURNER: Good morning.

THE COURT: Have you been able to hear everything so far?

MS. TURNER: Yes.

THE COURT: Do you have any areas of concern that you need to raise for us?

MS. TURNER: No.

THE COURT: Go ahead and go over your questionnaire with you here.

And if you could tell me, prior to your divorce, how was your husband employed?

MS. TURNER: I think it was American Building Maintenance.

THE COURT: Question number thirty-one asks if anybody close to you has ever been the victim of a crime. You indicate a house robbery. Was that your house?

MS. TURNER: Yes.

THE COURT: And how long ago was that?

MS. TURNER: Five or six years.

THE COURT: Was anybody arrested as a result of that?

MS. TURNER: No.

THE COURT: Anything at all about that incident that you feel might effect your ability to be fair and impartial [131] here?

MS. TURNER: No.

THE COURT: And you indicate that you served on a prior jury. Was it a medical malpractice or legal malpractice?

MS. TURNER: Medical.

THE COURT: That was a civil case. You may recall that the burden of proof was by a preponderance of the evidence.

MS. TURNER: Yes.

THE COURT: Can you assure us that you will apply the criminal burden of proof beyond a reasonable doubt in this case?

MS. TURNER: Yes.

THE COURT: And I notice that questions fifty-seven and fifty-eight you left blank. Those were your opinions about D.A.'s and Defense attorneys.

MS. TURNER: Oh, my mistakes.

THE COURT: Is it just you have no opinions?

MS. TURNER: I have none.

THE COURT: Can you think of any reason you cannot be fair and impartial in this case?

MS. TURNER: No.

THE COURT: Follow-up questions?

MR. BROWN: No, none.

MR. CANNON: No, Your Honor.

THE COURT: Pass for cause, Mr. Brown?

MR. BROWN: Yes, Your Honor.

[132] THE COURT: Mr. Cannon?

MR. CANNON: Pass for cause.

THE COURT: The challenge is with the People.

MR. BROWN: The People thank and excuse Mr. Hoagland.

* * *

[188] THE COURT: The challenge is with the People?

MR. BROWN: The People thank and excuse Ms. Turner.

THE COURT: Seat number?

MR. BROWN: Twelve.

THE COURT: Thank you very much for your time with us. We need you to report back downstairs, if you would, please.

* * *

[219] THE CLERK: Sarah Edwards.

THE COURT: Good afternoon.

MS. EDWARDS: Good afternoon.

THE COURT: And have you been able to hear everything today?

MS. EDWARDS: Yes.

THE COURT: Do you have any areas of concern that you need to raise?

MS. EDWARDS: No.

THE COURT: Let me go ahead and go through the questionnaire with you.

You know somebody that works for Hilltop Mall security. Anything about that relationship effect you here?

MS. EDWARDS: No.

THE COURT: And on question thirty, this is one of those that you circled. And frankly, I should have you fill this out this morning. You didn't fill out the rest of the question. You or anybody close to you ever been arrested?

MS. EDWARDS: I can answer that.

THE COURT: Was it you or someone else?

MS. EDWARDS: Someone else.

THE COURT: How is that person related to you?

MS. EDWARDS: Parent.

THE COURT: What was the person arrested for?

MS. EDWARDS: I believe was robbery.

[220] THE COURT: Was that in this county or someplace else?

MS. EDWARDS: Someplace else.

THE COURT: And how long ago are we talking about?

MS. EDWARDS: Over thirty-five years ago.

THE COURT: Is there anything about that incident that you feel might effect your ability to be fair here?

MS. EDWARDS: No.

THE COURT: As far as you know, was he or she treated fairly by the police department involved?

MS. EDWARDS: I have no knowledge.

THE COURT: The same thing would be true of the D.A.'s office then.

MS. EDWARDS: Right.

THE COURT: On the next question, you indicate that your house – excuse me, your auto was broken into, your jacket taken and et cetera in about 1993.

Was anybody arrested as a result of that?

MS. EDWARDS: I'm not – I don't know.

THE COURT: Anything about that incident that you feel might effect your ability to be fair and impartial here?

MS. EDWARDS: No.

THE COURT: Question number forty, the question about the type of the charges, the child abuse allegations, you indicated that you didn't know if you could be fair and impartial. Having heard discussions with the other jurors today, how do you feel about that now?

MS. EDWARDS: Yes, I feel I can be fair and [221] impartial.

THE COURT: Question number sixty-three is just the general one about after reading the questionnaire, has your attitude changed. You expressed that it was deeply saddened that it was an eighteen month old child and would not allow your emotions to get in the way of the verdict.

MS. EDWARDS: That's correct.

THE COURT: Base your verdict on the instructions and the law?

MS. EDWARDS: Yes.

MR. BROWN: No follow-up.

MR. CANNON: No.

THE COURT: Pass for cause?

MR. BROWN: Yes.

MR. CANNON: Pass.

THE COURT: And challenge is with the People.

MS. EDWARDS: People thank and excuse Ms. Edwards.

MR. CANNON: Your Honor, a moment.

THE COURT: We're going to take a break right now anyway.

And go ahead and take that break so all of us conferring can have a break as well. We'll be recess until ten after. Those of you seated in the jury box, remember where you're seated. Start back up at 3:10.

(Whereupon, the jury panel exited the courtroom.)

THE COURT: I'll go ahead and take our break and we'll start back up at five after with counsel.

* * *

[262] THE COURT: Ruby Lanere.

THE COURT: Good afternoon, have you been able to hear everything so far?

MS. LANERE: Yes.

THE COURT: And do you have any areas of concern other than stated in your questionnaire?

MS. LANERE: No.

THE COURT: Let me go ahead and go over that with you. Now, you know somebody that works for the Highway Patrol, a cousin?

MS. LANERE: Yes.

THE COURT: Anything about your relationship with him that you feel might affect your ability to be fair here?

MS. LANERE: No.

THE COURT: You indicate on question thirty that someone in the family had been arrested before. How long ago was that?

MS. LANERE: About twenty years ago.

THE COURT: Was that in this county or someplace else?

MS. LANERE: Someplace else.

THE COURT: Was she treated fairly by the police agency involved?

MS. LANERE: Yes.

THE COURT: And by the D.A.'s office?

MR. LANERE: Yes.

THE COURT: Can you think of any reason why you could not be fair and impartial here?

[263] MS. LANERE: No.

THE COURT: And you indicate that – I'm trying to read your handwriting. You were the victim of a robbery. How long ago?

MS. LANERE: Five years.

THE COURT: And was anybody arrested as a result of that?

MS. LANERE: No.

THE COURT: Do you feel that was handled adequately by whatever police agency was involved?

MS. LANERE: Yes.

THE COURT: Is there anything about that incident that you feel might effect your ability to be fair here?

MS. LANERE: No.

THE COURT: And you indicate that you served on a civil jury before.

MS. LANERE: Yes.

THE COURT: Can you assure us that you'll apply the criminal burden of proof beyond a reasonable doubt in this case?

MS. LANERE: Yes.

THE COURT: You had indicated on the questionnaire that you agreed with the statement that regardless of the law, the Defendant in a criminal trial should be required to prove his innocence.

Having heard the discussions, is that still your opinion.

MS. LANERE: Yes.

[264] THE COURT: Could you put aside that opinion and follow my instructions with regard to the presumption of innocence and the burden of proof?

MS. LANERE: Yes.

THE COURT: On the last question on the same page, you indicated that you would not be able to follow the instruction that you must judge the credibility of all witnesses, including peace officers, by the same standards.

Would you have a problem in judging the believability of police officers?

MS. LANERE: No.

THE COURT: Do you feel now that you've heard the explanation of the standards that you have to apply in judging the believability of all witnesses that you would be able to apply those equally to everyone, including police officers?

MS. LANERE: Yes.

THE COURT: The next question deals with the Defendant's right not to testify. You had indicated that you guessed that you could follow that instruction.

Having heard the discussions here in court today, do you feel that you would or would not be able to follow the instruction?

MS. LANERE: I would.

THE COURT: And on question forty and forty-one, you – this is the series of questions about the nature of the charges, the child abuse allegations, the age of the alleged victim in the case.

[265] MS. LANERE: Yes.

THE COURT: You indicated concern about your ability to be fair and impartial. And you said that you had a friend – looks like a friend's son was in jail with a similar case?

MS. LANERE: Yes.

THE COURT: Having listened to the discussions today, do you feel that you would or would not be able to be fair and impartial.

MS. LANERE: I could be fair.

THE COURT: Can you assure us that you'll set aside what you know about that case and not let that effect you?

MS. LANERE: Yes.

THE COURT: Also you indicated concern about evidence of domestic violence. And you felt that might affect your ability to be fair.

Would you be able to follow the admonition that I gave to the jurors this morning?

MS. LANERE: Yes.

THE COURT: And do you feel that you could be fair and impartial even if that type of evidence was introduced here?

MS. LANERE: Yes.

THE COURT: Question forty-five deals with the issue of interracial relations with women of different race

or color than himself by the Defendant. You indicated that that fact might affect your ability to be fair and impartial.

Do you still feel that way?

[266] MS. LANERE: No.

THE COURT: Can you assure us that whatever opinions or feelings that you have in that regard that you will be able to set them aside?

MS. LANERE: Yes.

THE COURT: Now, have you read or heard anything in the news media about this case?

MS. LANERE: No.

THE COURT: On that question number forty-eight, it asks – it's really a follow-up question for anybody who had heard or read anything about the case. In your explanation on that, you had indicated, first of all, that you might have a problem and you said because he is black and she is not. Again, I'm concerned about that same interracial question asked before.

MS. LANERE: I really didn't understand what was what.

THE COURT: Does it matter to you?

MS. LANERE: No, no.

THE COURT: Can you assure us that you're comfortable sitting on this type of case given the facts?

MS. LANERE: Yes.

THE COURT: Question sixty-three is the general question about whether or not your attitude

changed in any way after reading the questionnaire. You indicated yes, that you don't feel or didn't feel that you could – I'm not sure – be fair. "I feel like I will feel sorry in some parts of the case."

[267] Do you still feel that way?

MS. LANERE: No.

THE COURT: You've heard me talk to some of the other jurors about setting aside the emotions. Can you assure us that you can set aside your emotions and decide the case on the evidence and the law?

MS. LANERE: Yes.

THE COURT: And at the very bottom here, about – it's a question that asks if there's anything else that concerns you. Do you remember your answer on that question?

MS. LANERE: About understanding?

THE COURT: Yeah.

MS. LANERE: If it's explained to me, I can.

THE COURT: We've gone through a lot of talking today. Have you had any problems?

MS. LANERE: No, I followed it.

THE COURT: Can you think of any reason why you could not be fair and impartial in this particular case?

MS. LANERE: No.

THE COURT: Counsel, follow-up questions?

MR. CANNON: None by the Defense.

MR. BROWN: None.

THE COURT: Pass for cause?

MR. BROWN: Pass for cause.

MR. CANNON: Pass for cause.

THE COURT: Challenge is I believe is with the People.

MS. LANERE: The People thank and excuse Ms. Lanere.

* * *

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF CONTRA COSTA

BEFORE THE HONORABLE
PATRICIA SEPULVEDA, JUDGE

DEPARTMENT NO. 16

[Caption Omitted In Printing]

December 2, 1998

* * *

[97] (Juror No. 8), question thirty-one about anybody in the family being the victim of a crime. You talk about your car being stolen, parents' and in laws' homes burglarized and an attempt to break into your home.

How long ago were the various incidents?

JUROR NO. 8: The car theft was over twenty years ago. The burglaries at least five years or more.

THE COURT: And was anybody ever arrested as a result of any of those?

[98] JUROR NO. 8: No.

THE COURT: Do you feel the various police agencies involved handled the cases adequately?

JUROR NO. 8: Yes.

THE COURT: Anything about any of those incidents that might effect your ability to be fair and impartial here?

JUROR NO. 8: No, Your Honor.

THE COURT: Question thirty-two asks if anybody in the family or close to you has ever been called to testify as a witness. And you indicated that your wife had to testify in a case or at least that she was subpoenaed but didn't actually have to testify.

Was that in this county?

JUROR NO. 8: It was in this county.

THE COURT: And how long ago was that approximately?

JUROR NO. 8: I would estimate it was about four years ago.

THE COURT: And is there anything about that that you feel might affect your ability to be fair here?

JUROR NO. 8: No.

THE COURT: And question fifty-five about knowing police officers, you indicate you have an acquaintance from college with the FBI.

Do you ever talk to him about his work?

JUROR NO. 8: No.

THE COURT: Anything about your relationship with him that might affect your ability to be fair?

JUROR NO. 8: No.

[99] THE COURT: Having heard something about the case today, you think – can you think of any reason you cannot be fair and impartial?

JUROR NO. 8: No, Your Honor.

THE COURT: Thank you.

* * *

[158] DECEMBER 2, 1998 AFTERNOON SESSION, 1:30 P.M.

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PROCEEDINGS

THE COURT: Let the record reflect we're back in the presence of the prospective jurors.

(Juror No. 9), did you have any areas of concern that you needed to raise for us?

JUROR NO. 9: No, Ma'am.

THE COURT: Go over your questionnaire with you.

On question number thirty about anybody that's been arrested close to you, if you recall your answer there, how long ago was the incident that you referred to with your brother?

JUROR NO. 9: About three years ago.

THE COURT: Was that in this county or someplace else.

JUROR NO. 9: Daily City.

THE COURT: Is there anything about that incident that you feel might affect your ability to be fair here?

JUROR NO. 9: Not at all.

THE COURT: With regard to the incident that you referred to, how long ago was that?

JUROR NO. 9: Eight years ago.

THE COURT: Was that in this county?

JUROR NO. 9: Yes.

THE COURT: What police agency was involved?

JUROR NO. 9: C.H.P.

[159] THE COURT: Were charges actually filed?

JUROR NO. 9: No.

THE COURT: Were you treated fairly by the C.H.P.?

JUROR NO. 9: Very fairly.

THE COURT: Anything about that incident that you feel might effect your ability to be fair and impartial here?

JUROR NO. 9: Nothing at all.

THE COURT: The question where the statements are set forth and you're supposed to agree or disagree with them, a defendant should be required to prove his or her innocence, you indicated that you strongly agreed with that.

After hearing the discussions, would that be still be your answers?

JUROR NO. 9: No, it would have to be disagree now.

THE COURT: And question thirty-eight which explains the Defendant's constitutional right not to testify – and I've gone over that with several jurors this morning, you feel that if the Defendant is not guilty, you should explain why. Do you feel that you'd be able to follow the instruction set forth in the instruction?

JUROR NO. 9: Yes.

THE COURT: And that instruction just reminds you that if the Defendant's elects not to testify, you're not to let that enter into your deliberations.

JUROR NO. 9: Yes, Ma'am.

THE COURT: Question forty and also forty-one, these relate to the nature of the charges, the alleged child abuse and the age of the alleged victim. And you indicated that [160] you might – you have concern about your ability to be fair and impartial.

Again, having heard the discussions this morning, do you still have the concerns that you expressed here?

JUROR NO. 9: That's my general opinions.

THE COURT: And again, you've heard me explain to some of the jurors, the fact that you have the opinions does not necessarily mean that you couldn't be fair and impartial.

JUROR NO. 9: Yes.

THE COURT: The question is whether or not you could set aside the opinions and assure us that they won't effect you. Do you feel that you'd be able to do that or not?

JUROR NO. 9: Yes, I could.

THE COURT: And can you assure me you would put aside the emotional responses that you have here and decide the case based on the evidence and the law?

JUROR NO. 9: Based on the evidence, yes.

THE COURT: And the law that I give to you?

JUROR NO. 9: Yes.

THE COURT: And question forty-two refers to evidence relating to domestic violence.

JUROR NO. 9: If the evidence was present, yes.

THE COURT: If he there wasn't any – which type of evidence are you referring to?

JUROR NO. 9: Yes.

THE COURT: If there wasn't evidence presented, it wouldn't be an issue in the case.

[161] JUROR NO. 9: Right.

THE COURT: Assume there's such evidence. Would you be able to follow –

JUROR NO. 9: If there was such evidence, yes, I could.

THE COURT: Can you think of any other areas that haven't been covered in the questionnaire that you need to raise for us?

JUROR NO. 9: No, Ma'am.

THE COURT: Can you think of any reason you could not be fair and impartial in this case?

JUROR NO. 9: Not at all.

THE COURT: Mr. Brown, follow-up questions?

MR. BROWN: None, Your Honor.

MR. CANNON: None, Your Honor.

THE COURT: Pass for cause?

MR. BROWN: Pass for cause.

MR. CANNON: Pass.

THE COURT: The challenge with the Defense.

MR. CANNON: At this time the Defense would like to thank and excuse juror sitting in seat eleven, Betty Brian.

THE COURT: Thank you very much for your time with us. Get a slip and return downstairs, if you would, please.

Draw a name, please.

THE CLERK: (Juror No. 11).

THE COURT: Good afternoon.

JUROR NO. 11: Good afternoon, Your Honor.

THE COURT: And (Juror No. 11), were you able to [162] Hear everything going on so far?

JUROR NO. 11: Yes.

THE COURT: Do you have any areas of concern?

JUROR NO. 11: No.

THE COURT: I'm sorry, everybody's got a cough now. Did you have any areas of concern?

JUROR NO. 11: No.

THE COURT: Go over the questionnaire.

On question twenty-three, you indicate a friend who is a deputy sheriff. Does he or she work in this county?

JUROR NO. 11: No.

THE COURT: What county?

JUROR NO. 11: Down in Monterey.

THE COURT: Do you ever talk to him or her about their work?

JUROR NO. 11: Yes.

THE COURT: Is it a he or she?

JUROR NO. 11: A he.

THE COURT: Does he go in detail about his cases?

JUROR NO. 11: Yes.

THE COURT: Would that affect your ability to be fair here?

JUROR NO. 11: No.

THE COURT: How often would you say that you see him?

JUROR NO. 11: Weekly.

THE COURT: And if you were selected as a juror and, [163] hypothetically, to vote not guilty, do you think that would effect your relationship with him?

JUROR NO. 11: Not in the least.

THE COURT: On question twenty-nine, it asks if anybody in the family or close friends have received legal training. Who were you referring to?

JUROR NO. 11: Me.

THE COURT: What kinds of cases or training?

JUROR NO. 11: I was prelaw in undergraduate. I worked at a law firm a number of years, throughout high school and part of my college.

THE COURT: What type of law were you working in what area?

JUROR NO. 11: At the time I was serving summons and stuff, pretty much general, running around and filing.

THE COURT: Was it a firm that you were working for that did criminal defense work?

JUROR NO. 11: A little. Most of the time it was civil. A little pro bono that ended up being criminal.

THE COURT: If you're selected as a juror, if you remember any of your training and experience, will you be

able to set that aside and follow the instructions that I give to you?

JUROR NO. 11: Yes.

THE COURT: And not become the expert on the law for the jurors?

JUROR NO. 11: Absolutely.

THE COURT: If they have any questions about the [164] legal concepts of the instructions, they would have to refer those back to the Court.

JUROR NO. 11: Absolutely.

THE COURT: On question thirty-one, asks if you or anybody else has been the victim of a crime. You indicate that there was a robbery at your apartment.

JUROR NO. 11: Yes.

THE COURT: How long ago?

JUROR NO. 11: 1984.

THE COURT: Was anybody arrested?

JUROR NO. 11: Yes.

THE COURT: And charged?

JUROR NO. 11: I believe he was, yes.

THE COURT: And did you have to testify in court?

JUROR NO. 11: I did not.

THE COURT: Anything about that incident that might affect your ability to be fair here?

JUROR NO. 11: No.

THE COURT: Question number fifty-one asks if you know any attorneys. You list one and say that he does civil law and as far as you know, he doesn't do any criminal.

JUROR NO. 11: That's correct.

THE COURT: Question sixty, you indicate that somebody close to you has contributed time or money to B.W.A. or Battered Women's shelter at least. Anything about that that might effect your ability to be fair in this case?

JUROR NO. 11: Not in the least.

THE COURT: Is that you personally?

[165] JUROR NO. 11: Both my wife and I support Battered Women's shelter.

THE COURT: Can you think of any reason you cannot be fair and impartial in this case?

JUROR NO. 11: No.

THE COURT: Follow-up questions?

MR. BROWN: None.

THE COURT: Mr. Cannon?

MR. CANNON: One moment, Your Honor.

THE COURT: Pass for cause?

MR. BROWN: Pass.

MR. CANNON: Pass.

* * *

[171] Draw another name, please.

THE CLERK: (Juror No. 3).

THE COURT: (Juror No. 3), good afternoon.

JUROR NO. 3: Good afternoon.

THE COURT: And (Juror No. 3), have you been able to hear everything today?

JUROR NO. 3: Yes, I have.

THE COURT: Did you have any areas of concern other than those raised in the questionnaire?

JUROR NO. 3: No.

THE COURT: Let me go over that with you.

[172] Question thirty-two asks if anybody in your family or close to you has been called to testify as a witness. The incident that you talked about there where you were called to testify, was there anything about that that would effect your ability to be fair and impartial here?

JUROR NO. 3: No.

THE COURT: And again, that statement that a defendant in a criminal trial should be required to prove his or her innocence, you had indicated that you agree with that statement. Based upon the discussions and explanations here, do you feel that way at this point in time?

JUROR NO. 3: No, I would disagree.

THE COURT: Questions number forty and forty-one relating to the nature of the offense, let me read through your answer.

Again, you've expressed opinions that several jurors expressed, similar ones with regard to these questions. Do you feel that you could put aside your feelings in this regard and assure us that they won't effect you in this case?

JUROR NO. 3: Yes.

THE COURT: This morning I was talking to some of the jurors about being able to put aside their emotions and assure us that they'll decide the case based on the evidence and the law.

Do you feel that you'd be able to do that?

JUROR NO. 3: It would be difficult and emotional for myself, but I believe I can put them aside.

[173] THE COURT: Is that based on any particular life experience other than what you referred to here in the questionnaire?

JUROR NO. 3: No, just being a mother.

THE COURT: Okay.

Can you think of any reason at all why you could not be fair and impartial in this case?

JUROR NO. 3: No.

THE COURT: Follow-up questions?

MR. BROWN: No, none.

THE COURT: Pass for cause?

MR. BROWN: Yes.

MR. CANNON: Yes.

* * *

[177] THE CLERK: (Juror No. 7).

THE COURT: Good afternoon.

JUROR NO. 7: Hi.

THE COURT: And were you able to hear everything so far?

JUROR NO. 7: Yes.

THE COURT: Do you have any areas of concern to raise for the Court?

JUROR NO. 7: No.

THE COURT: Go over the questionnaire. Question thirty-one, has anyone close to you ever been the victim of a crime. You indicate stolen property. Was that you?

JUROR NO. 7: Yes.

THE COURT: And how long ago?

JUROR NO. 7: Last week.

[178] THE COURT: Last week. Was anybody been arrested?

JUROR NO. 7: No.

THE COURT: And what police agency was involved in that case?

JUROR NO. 7: Antioch Police Department.

THE COURT: Do you feel that they handled the case adequately, at least so far?

JUROR NO. 7: So far.

THE COURT: And anything about that incident that you feel might affect your ability to be fair and impartial here?

JUROR NO. 7: No.

THE COURT: Questions fifty-seven and fifty-eight, you may have skipped or may not have had an opinion that you wanted to express, whether you have an opinion about prosecuting attorneys or criminal Defense attorneys.

JUROR NO. 7: No opinion.

THE COURT: No opinion?

And can you think of any reason at all you cannot be fair and impartial in this case?

JUROR NO. 7: No.

THE COURT: Follow-up questions?

MR. BROWN: None.

MR. CANNON: No, Your Honor.

THE COURT: Pass for cause?

MR. BROWN: Yes.

MR. CANNON: Yes.

THE COURT: And challenge with the People.

* * *

[246] THE CLERK: (Juror No. 6).

THE COURT: Good afternoon, Sir.

JUROR NO. 6: Good afternoon.

THE COURT: And have you been able to hear everything so far?

JUROR NO. 6: Yes, Ma'am.

THE COURT: Do you have any areas of concern that you need to raise other than what might be in your questionnaire?

JUROR NO. 6: No, Ma'am.

THE COURT: Go ahead and go through that with you.

On question thirty, you indicate that you were arrested for driving with an open container sometime ago. Were there charges actually filed with that?

JUROR NO. 6: The charge that I wrote down, driving with an open container.

THE COURT: Do you feel that you were treated fairly by the police agency involved?

JUROR NO. 6: Yes, Ma'am.

[247] THE COURT: And by the District Attorney's office?

JUROR NO. 6: Yes, Ma'am.

THE COURT: Was that in this county or someplace else?

JUROR NO. 6: Someplace else.

THE COURT: Anything about that incident that might affect your ability to be fair and impartial here?

JUROR NO. 6: No, Ma'am.

THE COURT: You indicate on the next question your vehicle was vandalized and some property taken from it in 1995. Was anyone arrested as a result of that?

JUROR NO. 6: No, Ma'am.

THE COURT: Do you feel that the case was adequately handled by the police department involved?

JUROR NO. 6: Yes.

THE COURT: Anything about that that might effect your ability to be fair?

JUROR NO. 6: No, Ma'am.

JUROR NO. 6: No, Ma'am.

THE COURT: And having heard something about the questions – excuse me, the case now, can you think of any reason you cannot be fair and impartial?

JUROR NO. 6: No, Ma'am.

THE COURT: Follow-ups?

MR. BROWN: None.

MR. CANNON: No follow-up, Your Honor.

COURT: Pass for cause?

MR. BROWN: Yes.

MR. CANNON: Yes.

* * *

[252] THE CLERK: (Juror No. 12).

THE COURT: (Juror No. 12) do you have any areas of concern that you need to raise?

JUROR NO. 12: No.

THE COURT: Have you been able to hear everything going on?

[253] JUROR NO. 12: Yes.

THE COURT: You indicate that you have a friend in Seattle who's a police officer. Anything about your relationship with him that you feel might effect your ability to be fair?

JUROR NO. 12: No.

THE COURT: Ever discuss his cases with him in detail?

JUROR NO. 12: No. I haven't seen him for a couple of years.

THE COURT: You indicate on question thirty that you had a cousin arrested a long time ago. Apparently, you don't know a lot about it.

JUROR NO. 12: I was back East and it was out here.

THE COURT: I assume then there's nothing about that that effect your ability to be fair here?

JUROR NO. 12: No.

THE COURT: You indicate that your brother's house was burglarized in Houston Texas. How long ago?

JUROR NO. 12: Probably five years ago.

THE COURT: Anything about that incident that you think might effect you here?

JUROR NO. 12: No.

THE COURT: And you indicate that you were a witness at a trial in college. Is there anything about that incident that you think might effect you here?

JUROR NO. 12: No.

THE COURT: Do you feel that you were treated fairly [254] by the attorneys in that case?

JUROR NO. 12: Yes.

THE COURT: And having heard more about the case, can you think of any reason why you could not be fair and impartial?

JUROR NO. 12: There's one thing that I forgot to put on there. My grandfather was in the police force.

THE COURT: Which police agency?

JUROR NO. 12: This was back in Pittsburgh. He passed away about thirty years ago.

THE COURT: Anything about that that would effect your ability to be fair here?

JUROR NO. 12: No.

THE COURT: Follow-up?

MR. BROWN: No.

MR. CANNON: No.

THE COURT: Pass for cause?

MR. BROWN: Yes.

MR. CANNON: Yes.

* * *

[268] THE CLERK: (Juror No. 10).

THE COURT: And (Juror No. 10), have you been able to hear everything?

JUROR NO. 10: Yes.

THE COURT: Any areas of concern other than those raised in your questionnaire?

JUROR NO. 10: I have a question. If I were to sit on this jury, are you telling us that we're not allowed to work at night?

THE COURT: No, I said I don't want you to work so many hours that you fall asleep in the jury box. If you have to work a few hours, that's okay. I don't want people working a graveyard shift and sitting here for eight hours.

Any other areas of concern not raised in your questionnaire?

JUROR NO. 10: No.

THE COURT: Your brother-in-law is employed by the Fremont Police Department?

JUROR NO. 10: Yep.

THE COURT: Anything about your relationship with him that might effect your ability to be fair here?

JUROR NO. 10: No.

THE COURT: Do you ever discuss his cases with him at all?

JUROR NO. 10: No.

[269] THE COURT: You indicate on question thirty that in the past you had a D.U.I. case. Were charges filed?

JUROR NO. 10: Yes.

THE COURT: Did that case go to trial?

JUROR NO. 10: No.

THE COURT: Was that in this county or someplace else?

JUROR NO. 10: Someplace else.

THE COURT: As far as you're concerned, were you treated fairly by the police?

JUROR NO. 10: Yes.

THE COURT: And by the D.A.'s office?

JUROR NO. 10: Yes.

THE COURT: Anything about that case that would effect your ability to be fair?

JUROR NO. 10: No.

THE COURT: On the next question, you indicate that you've had property stolen. You personally or somebody else?

JUROR NO. 10: Myself.

THE COURT: And how long ago?

JUROR NO. 10: Fifteen years ago.

THE COURT: Was anybody arrested as a result of that?

JUROR NO. 10: No.

THE COURT: Anything about that that you feel might effect your ability to be fair here?

JUROR NO. 10: No.

THE COURT: You were once a witness to a felony [270] drunk driving accident with a fight. Did you have to testify in court on that?

JUROR NO. 10: Yes.

THE COURT: And did you feel that you were treated fairly by the attorneys in. that case?

JUROR NO. 10: A little hostile by the Defense attorney.

THE COURT: Is there anything about that experience that you feel might carry over and affect your ability to be fair and impartial here?

JUROR NO. 10: Hmm, no.

THE COURT: Different Defense attorney, I'm assuming.

JUROR NO. 10: Much older.

THE COURT: Questions forty and forty-one are the ones about the nature of the charges, the child abuse

allegations and the age of the alleged victim. You indicated strong opinions here.

Having heard the discussions, do you feel that you can or cannot be a fair and impartial juror in this type of case?

JUROR NO. 10: I could be fair.

THE COURT: Can you assure us that you'll set aside your emotions and your [sic] render your verdict based on the evidence and the law in this case?

JUROR NO. 10: Yes.

THE COURT: And the feelings that you have with regard to child abuse, are those based on life experiences?

[271] JUROR NO. 10: Just general feelings.

THE COURT: You indicate that you make donations to Battered Women's shelter in Hayward. Anything about that that might effect your ability to be fair here?

JUROR NO. 10: No, I don't think so.

THE COURT: Can you think of any reason at all you could not be fair and impartial in this case?

JUROR NO. 10: No.

THE COURT: Counsel, any follow-up questions you wish me to ask?

MR. BROWN: None, pass for cause.

MR. CANNON: Before I respond, the Court's aware I'm not waiving any issues?

THE COURT: I understand.

MR. CANNON: Pass for cause. No questions.

THE COURT: The challenge is with the Defense.

MR. CANNON: Pass.

THE COURT: The Defense passes.

And challenge is with the People.

MR. BROWN: The People are satisfied were [sic] the jury as impaneled. The People pass.

THE COURT: Swear the jury, please.

* * *

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF CONTRA COSTA

BEFORE THE HONORABLE
PATRICIA SEPULVEDA, JUDGE

DEPARTMENT NO. 16

[Caption Omitted In Printing]

December 3, 1998

* * *

[280] THE CLERK: (Alternate Juror No. 1).

THE COURT: Good morning.

ALTERNATE JUROR NO. 1: Good morning.

THE COURT: (Alternate Juror No. 1), were you able to hear everything yesterday?

ALTERNATE JUROR NO. 1: Yes.

THE COURT: Do you have any areas of concern other than what you raised in your questionnaire?

ALTERNATE JUROR NO. 1: No.

THE COURT: You indicated on question thirty that someone in the family had been arrested at one point in time That was sometime ago, is that correct?

ALTERNATE JUROR NO. 1: It was in 1991.

THE COURT: Was that in this county?

ALTERNATE JUROR NO. 1: Yes.

THE COURT: Anything about that that might effect your ability to be fair and impartial here?

[281] ALTERNATE JUROR NO. 1: No, not at all.

THE COURT: Do you know if charges were actually filed?

ALTERNATE JUROR NO. 1: Yes, they were.

THE COURT: Was he treated fairly by the D.A.'s office and the police agency involved?

ALTERNATE JUROR NO. 1: Yes.

THE COURT: And on question thirty-two, you indicate that you had to testify in a case. Anything about that experience that you feel might effect your ability to be fair here?

ALTERNATE JUROR NO. 1: No.

THE COURT: Were you treated fairly by the two attorneys in the case?

ALTERNATE JUROR NO. 1: Yes.

THE COURT: And having heard more about the case now, can you think of any reason why you cannot be fair and impartial?

ALTERNATE JUROR NO. 1: No.

* * *

[No. A085450, First Dist., Div. Two. Apr. 5, 2001.]

CALIFORNIA COURT OF APPEAL

THE PEOPLE, Plaintiff and Respondent, v. JAY SHAWN JOHNSON, Defendant and Appellant.

[Opinion certified for partial publication.*]

[Reprinted without change for tracking pending review and disposition by the Supreme Court.]

COUNSEL

Stephen B. Bedrick for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Ronald A. Bass, Assistant Attorney General, Martin S. Kaye and Richard Rochman, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

KLINE, P.J. – Jay Shawn Johnson was convicted of second degree murder and assault resulting in the death of a child under the age of eight (Pen. Code, §§ 187, 273ab) upon retrial after a partial reversal on his first appeal. The murder victim was Janika Price, the 19-month-old daughter of Jennifer Shelton with whom appellant was romantically involved. In the first appeal, we affirmed appellant's conviction of corporal injury on a cohabitant, Jennifer Shelton (Pen. Code, § 273.5), and reversed his

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part II.

convictions of second degree murder and assault on a child leading to death for error in jury instructions on the cause of death. Appellant was retried in December 1998, and was sentenced to 15 years to life imprisonment on the murder conviction to run concurrently with the three-year term for corporal injury on a cohabitant.

Appellant raises a number of evidentiary issues, as well as a claim that the trial court erred when it failed to find a prima facie case of a *Wheeler* (*People v. Wheeler* (1978) 22 Cal.3d 258 [148 Cal.Rptr. 890, 583 P.2d 748]) violation. We conclude a prima facie case of group bias was established and that the judgment must therefore be reversed. In the unpublished portion of this opinion we set forth factual details unrelated to the *Wheeler* issue that bear upon evidentiary questions that are addressed to provide guidance to the trial court upon retrial.

DISCUSSION

I.

Appellant, who is African-American, contends the prosecutor improperly used peremptory challenges to excuse three African-American prospective jurors because of their race, which completely eliminated African-Americans from the jury. Appellant made two motions for a mistrial under *People v. Wheeler, supra,* 22 Cal.3d 258 for racial discrimination in jury selection. Both were denied for failure to present a prima facie case.

The first *Wheeler* motion was directed to the prosecution's challenges to "three African-American women,"

namely Clodette T., Sara E., and Bernice L.[1] Defense counsel argued there were no valid race-neutral justifications for these challenges. Finding no prima facie case had been established, the court denied the motion, adding: "[h]owever, I would indicate that we are very close, Mr. Brown [prosecutor]."

The second *Wheeler* motion was made the next day, in response to the prosecutor's peremptory challenge to another African-American woman, Ruby L. Defense counsel maintained that the prosecutor's peremptory challenge of every African-American seated reflected a systematic attempt to exclude African-Americans from the jury panel. In denying the motion, the court noted that it found Ms. L.'s answers sufficient to justify a peremptory challenge in that her answers to the questionnaire raised concerns about her ability to understand the proceedings. As to Sara E., the court noted that she had omitted in her questionnaire the information about a parent's arrest for robbery some 30 years earlier. The court also recalled that Ms. E. had indicated concern about whether she could be fair, even though her "answers tend to lean in favor of the prosecution." The court made no comment about the challenge of Clodette T. In denying the motion the court stated: "Even with the addition of Ms. L., the Court will not find a prima facie case. The People are [not] exercising challenges based on group bias, rather than individual bias." The court then offered the prosecutor the opportunity to make a further record, which he declined.

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[1] Bernice L. was later dropped from the motion after it was ultimately determined that her racial background was "Indian."

"The use of peremptory challenges to eliminate prospective jurors because of their race is prohibited by the federal Constitution (*Powers v. Ohio* (1991) 499 U.S. 400, 409 [113 L.Ed.2d 411, 424, 111 S.Ct. 1364]; *Batson v. Kentucky* (1986) 476 U.S. 79, 89 [90 L.Ed.2d 69, 82-83, 106 S.Ct. 1712] and by the California Constitution (*People v. Wheeler*[, *supra*,] 22 Cal.3d 258, 276-277 . . .)." (*People v. Mayfield* (1997) 14 Cal.4th 668, 722-723 [60 Cal.Rptr.2d 1, 928 P.2d 485].)

A.

At the time the parties briefed this case, there was a dispute about whether *Wheeler* required a greater evidentiary showing for a prima facie case than was required under *Batson*.[2] *Wheeler* states: "If a party believes his

[2] Appellant cited only *Wheeler* in his motions for a mistrial and did not mention the federal Constitution or the *Batson* case. The People maintain that appellant's failure to articulate the federal basis for his objection to the peremptory challenges waives the claim, citing *People v. McPeters* (1992) 2 Cal.4th 1148, 1174 [9 Cal.Rptr.2d 834, 832 P.2d 146]. In *McPeters*, the court found the defendant had waived the asserted Sixth Amendment ground by failing to raise it in connection with his *Wheeler* motion, but it nevertheless rejected the claim on its merits. (*McPeters, supra*, 2 Cal.4th at p. 1174.) Appellant denies he waived his federal rights, citing *Ford v. Georgia* (1991) 498 U.S. 411, 418-419 [111 S.Ct. 850, 854-855, 112 L.Ed.2d 935], which held a defendant's objection to racial discrimination in jury selection was sufficient to invoke his federal right to be free of racial discrimination in jury selection under *Batson*, even if he did not cite *Batson* or describe with particularity the exact federal provision violated. (See also *Turner v. Marshall* (9th Cir. 1995) 63 F.3d 807, 811, fn. 1 [challenge framed in terms of *Wheeler* construed to allege *Batson*]; overruled on other grounds by *Tolbert v. Page* (9th Cir. 1999) 182 F.3d 677.) The debate as to whether appellant made and preserved a *Batson* claim makes sense only if, as the parties seem to believe, it is more difficult to establish a prima facie case under

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opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he must raise the point in timely fashion and make a prima facie case of such discrimination to the satisfaction of the court. First, . . . he should make as complete a record of the circumstances as is feasible. Second, he must establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule. Third, from all the circumstances of the case he must show a *strong likelihood* that such persons are being challenged because of their group association rather than because of any specific bias." (*People v. Wheeler, supra*, 22 Cal.3d at p. 280, italics added, fn. omitted.) In the next paragraph of the *Wheeler* opinion the court describes the types of evidence a party may use to show his opponent is challenging persons from the venire because of their group association. The opinion then goes on to state that "[u]pon presentation of this and similar evidence . . . the court must determine whether a *reasonable inference* arises that peremptory challenges are being used on the ground of group bias alone." (*Id.* at p. 281, italics added.) As will be seen, the separate references to "strong likelihood" and "reasonable inference" has created some confusion as to which of the two standards applies, as most courts that have addressed the question have concluded that a "strong likelihood" requires a stronger showing than a mere inference.

Wheeler than under *Batson*. As later discussed, our Supreme Court has recently made it clear that *Wheeler* imposes the same standard as *Batson*. The question whether appellant waived a *Batson* claim is therefore now moot.

There is, however, no such confusion as to which standard applies under *Batson,* the federal counterpart to *Wheeler.* To establish a prima face case of discrimination under the United States Constitution, *Batson* states that a defendant must "*raise an inference* that the prosecutor used that practice [peremptory challenges] to exclude the veniremen from the petit jury on account of their race." (*Batson v. Kentucky, supra,* 476 U.S. at p. 96 [106 S.Ct. at p. 1723], italics added.) The difference in language between *Wheeler* ("strong likelihood") and *Batson* ("raise an inference") led to a dispute about whether *Wheeler* established a stricter test than *Batson.* In *People v. Fuller* (1982) 136 Cal.App.3d 403, 423 [186 Cal.Rptr. 283], which was decided prior to *Batson,* the court acknowledged that the *Wheeler* opinion uses both phrases, but concluded "that a fair reading of *Wheeler* requires only that the court find a reasonable inference of group bias. . . . " (*Ibid.*) The *Fuller* court was "unwilling to believe that our high court intended to create different options for trial judges within one page of each other in so carefully crafted an opinion as the *Wheeler* opinion." (*Id.* at p. 423, fn. 25.)

The *Fuller* view of *Wheeler* was repudiated in *People v. Bernard* (1994) 27 Cal.App.4th 458 [32 Cal.Rptr.2d 486] which rejected the view "that a fair reading of *Wheeler* requires only that the court find a reasonable inference of group bias." (*People v. Fuller, supra,* 136 Cal.App.3d at p. 423.) According to the *Bernard* court, "a reduction of the prima facie standard to a 'reasonable inference' test would reduce the trial court's discretion and judgment at a time when it is uniquely situated to observe the nature and extent of voir dire as well as the attitude and awareness of the challenged prospective juror." (27 Cal.App.4th at p. 465) The conclusion of the *Bernard* court that a "strong likelihood" requires a stronger showing than a "reasonable inference," and that such a stronger showing must be made to establish a prima facie case of violation of the *Wheeler* rule, has been followed by other appellate courts in this state. (See, e.g., *People v. Buckley* (1997) 53 Cal.App.4th 658, 665-666 [61 Cal.Rptr.2d 860]; *People v. Walker* (1998) 64 Cal.App.4th 1062, 1067 [75 Cal.Rptr.2d 871].)

Recently, in *Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190, the Ninth Circuit observed that since the decision in *Bernard,* "the California state courts have applied a lower standard of scrutiny to peremptory strikes than the federal Constitution permits. [¶] The California Supreme Court now routinely insists, despite *Batson,* that a defendant must show 'a strong likelihood' of racial bias. Its consistent practice is to cite *Batson* and *Wheeler* together as controlling law but to quote the 'strong likelihood' language from *Wheeler* rather than the 'raise an inference' language from *Batson.* [Citations.] *Batson* is, of course, the law of the land. California law may give greater protection to criminal defendants than is required by the federal Constitution, but it cannot give less. Yet this is precisely what the California courts now do when they follow the *Wheeler* 'strong likelihood' test in determining whether a prima facie case has been established. [¶] In our view, the *Wheeler* 'strong likelihood' test for a successful prima facie showing of bias is impermissibly stringent in comparison to the more generous *Batson* 'inference' test." (*Id.* at pp. 1196-1197) Accordingly, the *Wade v. Terhune* court concluded that "[w]here the California courts follow the 'strong likelihood' language of *Wheeler* without any indication that they are actually applying a 'reasonable inference' test

consonant with *Batson*, they apply an incorrect legal standard." (*Id.* at p. 1197.)

Wade v. Terhune also opines "that the *Wheeler* court itself understood 'a strong likelihood' to mean a 'reasonable inference.' While the *Wheeler* Court, on page 280 of its opinion, required a defendant to 'show a strong likelihood' that the prosecutor excluded venire members from the jury on the basis of race, the *Wheeler* Court phrased its central holding somewhat differently on the very next page: 'Upon presentation of this and similar evidence – in the absence, of course, of the jury – the court must determine whether a *reasonable inference* arises that peremptory challenges are being used on the ground of group bias alone.' *Id.* at 281 . . . (emphasis added). It is this language regarding a 'reasonable inference' that the Supreme Court of the United States borrowed when it formulated the *Batson* test." (*Wade v. Terhune, supra,* 202 F.3d at p. 1196.)

In *People v. Box* (2000) 23 Cal.4th 1153 [99 Cal.Rptr.2d 69, 5 P.3d 130], which issued six months after *Wade v. Terhune,* our high court included a short footnote agreeing with the Ninth Circuit that "in California, a 'strong likelihood' means a 'reasonable inference'" (*id.* at p. 1188, fn. 7) and disapproving *People v. Bernard, supra,* 27 Cal.App.4th 458.[3] The Attorney General dismisses this

[3] Prior to *Box*, our Supreme Court made no effort to clarify the ambiguity in *Wheeler.* Nor has it yet done so since *Box.* In *People v. Ayala* (2000) 24 Cal.4th 243 [99 Cal.Rptr.2d 532, 6 P.3d 193], Justice Mosk, writing for the majority, simply states in passing that a party claiming peremptory challenges are being used to strike jurors on the ground of group bias must, among other things, "'"'show a strong likelihood [or reasonable inference] that such persons are being challenged because of their group association. . . . '"'" (*Id.* at p. 260,

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statement as relatively insignificant. All it means, he says, is that the Supreme Court and intermediate appellate courts were always adhering to the *Batson* standard. In other words, according to the Attorney General, for *Wheeler* purposes, "strong likelihood" and "reasonable inference" have always meant the same thing; because the test is the same it is immaterial which phrase is used. As we shall discuss in a moment, this view, which we attribute neither to the Ninth Circuit nor our Supreme Court, conflicts with common understanding and the different meanings historically attributed by our legal system to the words at issue, would cause enormous confusion in the trial courts of this state and exacerbate the doubts that have already been raised as to the compatibility of *Wheeler* and *Batson.* Moreover, the notion that our Supreme Court not only thinks but has *always thought* that a "strong likelihood" is synonymous with a "reasonable inference" for purposes of the *Wheeler* rule, and that the lower courts of this state knew or should have known of this, was persuasively rebutted by the Ninth Circuit in *Wade v. Terhune, supra,* 202 F.3d at pp. 1196-1197.

Though not cited in *Wade v. Terhune, supra*, 202 F.3d 1190, *People v. Sanders* (1990) 51 Cal.3d 471 [273 Cal.Rptr. 537, 797 P.2d 561] demonstrates the California Supreme Court's post-*Wheeler* and pre-*Box* belief that the "strong likelihood" requirement imposes a more stringent burden that the "reasonable inference" requirement. In *Sanders,* all but four Spanish surnamed members of the venire were excused for cause either by the defense or the

quoting *People v. Box, supra,* 23 Cal.4th at pp. 1187-1188; brackets added in *Box.*)

prosecution. When the remaining four were peremptorily challenged by the prosecution, the defendant asserted a *Wheeler* objection. The trial court denied the motion, finding the defendant had failed to demonstrate a prima facie case that the prosecutor was relying on group rather than specific bias. The Supreme Court affirmed. Acknowledging that "the removal of all members of a certain group may give rise to an inference of impropriety" under *Wheeler* (*People v. Sanders, supra*, at p. 500), the Supreme Court emphasized the deference owed the trial court and primarily on that basis concluded that the "defendant failed to demonstrate a strong likelihood based on 'all the circumstances of the case' that the prosecutor's exercise of his peremptory challenges were based on group bias." (*Id.* at p. 501) After *Sanders,* most Supreme Court opinions applying the *Wheeler* rule omit any reference to the "reasonable inference" standard and focus *only* on the need to show a "strong likelihood" of group bias. (See, e.g., *People v. Welch* (1999) 20 Cal.4th 701, 745 [85 Cal.Rptr.2d 203, 976 P.2d 754]; *People v. Williams* (1997) 16 Cal.4th 635, 663-664 [66 Cal.Rptr.2d 573, 941 P.2d 752]; *People v. Mayfield, supra*, 14 Cal.4th 668, 723; *People v. Arias* (1996) 13 Cal.4th 92, 134-135 [51 Cal.Rptr.2d 770, 913 P.2d 980]; *People v. Davenport* (1995) 11 Cal.4th 1171, 1199-1200 [47 Cal.Rptr.2d 800, 906 P.2d 1068]; *People v. Turner* (1994) 8 Cal.4th 137, 164-165 [32 Cal.Rptr.2d 762, 878 P.2d 521]; *People v. Garceau* (1993) 6 Cal.4th 140, 170-171 [24 Cal.Rptr.2d 664, 862 P.2d 664].) Indeed, the court has even italicized "strong likelihood" to emphasize the stringency of that requirement. (*People v. Howard* (1992) 1 Cal.4th 1132, 1154 [5 Cal.Rptr.2d 268, 824 P.2d 1315].)

In light of this, as the Ninth Circuit correctly observed, California courts confidently relied on the now

disapproved language in *People v. Bernard, supra,* 27 Cal.App.4th at pages 464-466, supporting application of the more demanding "strong likelihood" standard. In the present case, for example, in finding that appellant did not establish a prima facie case of group bias, the trial court stated as follows: "there's not been shown a strong likelihood that the exercise of the peremptory challenges were based upon a group rather than an individual basis. The Court has to start from the position of a premise that the exercises of the peremptory challenges were based on constitutional grounds." This language tracks the disapproved language in *Bernard* that the "presumption a party exercising a peremptory challenge is doing so on a constitutionally firm ground. . . . should be capable of being rebutted only by *a strong showing,* not a *mere inference.*" (*Id.* at p. 465, italics added.) As this formulation of the initial showing of discrimination required by *Wheeler* has been rejected, we do not believe we can employ it.

The question, then, is the meaning of the footnoted statement in *Box* that "in California, a 'strong likelihood' means a 'reasonable inference.'" (23 Cal.4th at p. 1188, fn. 7.) We do not believe it means that California courts have always treated the two phrases as meaning the same thing, which would be as novel a proposition as the idea that "clear and convincing evidence" has always meant a "preponderance of the evidence."

Though an "inference" may be defined as "an implication" (Oxford English Dict. (2d ed. 1989) p. 924), the word is ordinarily used in the law to refer to "[a] conclusion reached by considering other facts and deducing a logical consequence from them," or "[t]he process by which such a conclusion is reached; [i.e.,] the process of thought by which one moves from evidence to proof." (Black's Law

Dict. (7th ed. 1999) p. 781.) An inference may be reasonably deducible from evidence even if it conflicts with another inference that may also be deducible from the same evidence. (See, e.g., *Grainger v. Antoyan* (1957) 48 Cal.2d 805, 807 [313 P.2d 848] ["When two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court."]; Code Civ. Proc., § 437c, subd. (c) ["summary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence"].) As Witkin points out, "the party's proof need not wholly exclude all unfavorable inferences; i.e., the party is not required to show that, under the circumstances, the inference in his or her favor is the only one that can reasonably be drawn. [Citations.]" (3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, § 139, p. 198.)

However, while the same evidence, including circumstantial evidence, can give rise to conflicting inferences that are equally reasonable, the same evidence cannot simultaneously support "strong likelihoods" pointing in different directions. Thus, while courts in this State have disagreed about whether the initial showing of discrimination that constitutes a prima facie case under *Wheeler* is a "strong likelihood" or a "reasonable inference" (as, for example, the disagreement of *People v. Bernard, supra,* 27 Cal.App.4th at pp. 465-466, with the view expressed in *People v. Fuller, supra,* 136 Cal.App.3d at p. 423), the dispute was predicated upon the shared belief that the latter standard imposes a lesser burden than the former. Indeed, as already noted, the belief that a "strong likelihood" of group bias requires greater evidence than a "reasonable inference" of such bias was expressed by the

Supreme Court more than a decade ago. (*People v. Sanders, supra,* 51 Cal.3d at pp. 500-501.)

The statement in *Box* that "a 'strong likelihood' means a 'reasonable inference'" (*People v. Box, supra,* 23 Cal.4th at p. 1187, fn. 7) cannot be construed to mean that the phrases are synonymous (let alone that they were *always* thought to be synonymous), as that would reject long-standing judicial understandings, and require explanation. The different meaning of the statement is revealed, we think, by its obvious purpose, which was to reconcile *Wheeler* and *Batson* after its incompatible application of *Wheeler* was called to our Supreme Court's attention by the Ninth Circuit in *Wade v. Terhune.* As the Ninth Circuit stated, "[t]he United States Supreme Court has explained that the *Batson* framework was intended significantly to reduce the quantum of proof previously required of a defendant who wished to raise a claim of racial bias in the jury selection procedure. See *Georgia v. McCollum,* 505 U.S. 42, 47 [112 S.Ct. 2348, 2352-2353, 120 L.Ed.2d 33]." (*Wade v. Terhune, supra,* 202 F.3d at p. 1197) *Wheeler* is not consistent with the *Batson* framework unless the quantum of proof required by *Wheeler* to establish a prima facie case of group bias is no higher than that required under *Batson.* The statement in *Box* that "a 'strong likelihood' means a 'reasonable inference'" (*Box,* at p. 1187, fn. 7) therefore must be taken to mean that, *for purposes of determining whether a party has established a prima facie case of group bias,* the words "strong likelihood," *as used in Wheeler and case law relating to the Wheeler rule,* shall henceforth be deemed to mean a "reasonable inference" (which is the opposite of saying that a "reasonable inference" shall be deemed to mean a "strong likelihood"). This was the view of *Wheeler* adopted in *People v. Fuller, supra,*

136 Cal.App.3d 403, and rejected in *People v. Bernard, supra*, 27 Cal.App.4th 458. By disapproving *Bernard,* the Supreme Court has in effect clarified its agreement with *Fuller* that a "reasonable inference" of group bias suffices to establish a prima facie case.

We note, finally, that the Ninth Circuit has indicated its unwillingness to defer to the Attorney General's different interpretation of *People v. Box, supra,* 23 Cal.4th 1153, as clarifying that the "strong likelihood" and "reasonable inference" standards are now and have always been the same, and that use of the "strong likelihood" standard is therefore constitutionally permissible. In *Cooperwood v. Cambra* (9th Cir. Feb. 20, 2001, No. 99-15518) ___ F.3d ___, [2001 WL 322149] the Ninth Circuit recently declared that "regardless of the California Supreme Court's 'clarification' [in *Box*] of the language used in *Wheeler,* we will continue to apply *Wade's* de novo review requirement whenever state courts use the 'strong likelihood' standard, as these courts are applying a lower standard of scrutiny to peremptory strikes than the federal Constitution permits." (*Ibid.*, citing *Wade v. Terhune, supra,* 202 F.3d at p. 1192.)

B.

In determining whether appellant established a reasonable inference of group bias, we do not limit our review solely to counsel's presentation at the time of the motion. This is because "other circumstances" readily apparent to the trial court might support the finding of a prima facie case even though not cited by defense counsel. (See *People v. Howard, supra,* 1 Cal.4th at p. 1155.) "[T]he trial court [should not] blind itself to everything except

defense counsel's presentation." (*Ibid.*) Indeed, *Wheeler* emphasized that such rulings require trial judges to consider "all the circumstances of the case" (*Wheeler, supra,* 22 Cal.3d at p. 280) and called upon judges to exercise their powers of observation, their understanding of trial techniques and their broad judicial experience. (*Howard, supra,* 1 Cal.4th at p. 1155.)

It is for these reasons that the reviewing court is directed to consider "the entire record of voir dire" when a trial court denies a *Wheeler* motion without finding a prima facie case of group bias. "As with other findings of fact, we examine the record for evidence to support the trial court's ruling." (*People v. Howard, supra,* 1 Cal.4th at p. 1155.) Because *Wheeler* motions call upon trial judges' personal observations, we view their rulings with considerable deference on appeal. If the record suggests grounds upon which the prosecutor might reasonably have challenged the jurors in question, we affirm. (*Ibid.; People v. Box, supra,* 23 Cal.4th at p. 1188.) The ruling is thus reviewed for substantial evidence. (See *People v. Alvarez* (1996) 14 Cal.4th 155, 196 [58 Cal.Rptr.2d 385, 926 P.2d 365].)

As will be seen, the prima facie case asserted in this case rests in some measure on a comparison of the written and oral voir dire testimony of the African-Americans excused by the prosecution with that of other prospective jurors who were not excused, which appellant claims are materially indistinguishable. This requires us to consider whether and, if so, to what extent such comparisons may be used to show a prima facie case of group bias. Unfortunately, this is another area in which the application of *Wheeler* by California courts has differed somewhat from federal judicial application of *Batson.*

Relying on its earlier opinion in *People v. Johnson* (1989) 47 Cal.3d 1194, 1220-1221 [255 Cal.Rptr. 569, 767 P.2d 1047], which dealt with the review of reasons proffered by the prosecutor after a prima facie case had been found, the California Supreme Court has recently reiterated its rejection of "'a procedure that places an "undue emphasis on comparisons of the stated reasons for the challenged excusals with similar characteristics of nonmembers of the group who were not challenged by the prosecutor," noting that such a comparison is one-sided and that it is not realistic to expect a trial judge to make such detailed comparisons midtrial.'" (*People v. Box, supra,* 23 Cal.4th at p. 1190.)

Federal courts have not been as reluctant as our Supreme Court to employ comparative analyses of voir dire testimony in order to determine whether the use of a peremptory challenge reflects racial or other forms of group bias and routinely do so. (See, e.g., *Caldwell v. Maloney* (1st Cir. 1998) 159 F.3d 639, 651, cert. den. 522 U.S. 1153 [118 S.Ct. 1178, 140 L.Ed.2d 186] [reasons given for challenge, though plausible, may raise serious question of pretext where explanation is equally applicable to juror of different race who was not stricken]; *Devose v. Norris* (8th Cir. 1995) 53 F.3d 201, 203-205 [finding state's reason for excusing black jurors pretextual when several white jurors who were not struck gave similar answers].) This is particularly true in the Ninth Circuit. As a panel of that court recently observed, "[a] prosecutor's motives may be revealed as pretextual where a given exception is equally applicable to a juror of a different race who was not stricken by the exercise of a peremptory challenge. See *Caldwell v. Maloney,* 159 F.3d 639, 651[, *supra*]. 'A comparative analysis of jurors struck and those remaining is a

well-established tool for exploring the possibility that facially race-neutral reasons are a pretext for discrimination.' *Turner v. Marshall,* 121 F.3d 1248, 1251 (9th Cir. 1997). Peremptory challenges cannot be lawfully exercised against potential jurors of one race unless potential jurors of another race with comparable characteristics are also challenged. See *id.*" (*McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1209, 1220-1221; accord, *U.S. v. Chinchilla* (9th Cir. 1989) 874 F.2d 695.)

The difference between our Supreme Court and the Ninth Circuit is not, however, as great as it first appears. For one thing, our Supreme Court has not precluded comparative analyses by reviewing courts but has simply declared that they should not place an "*undue emphasis*" on such an analysis (*People v. Box, supra,* 23 Cal.4th at p. 1190; *People v. Turner, supra,* 8 Cal.4th at p. 169; *People v. Johnson, supra,* 47 Cal.3d at p. 1220.) Indeed, the Supreme Court has itself occasionally engaged in such analyses. For example, in *People v. Crittenden* (1994) 9 Cal.4th 83 [36 Cal.Rptr.2d 474, 885 P.2d 887], in considering a challenge to a trial court finding that no prima facie case had been shown, the court entertained the defendant's claim that many jurors had expressed similar concerns about the death penalty as prospective African-American jurors who were excused. Instead of refusing to consider such a comparison, the *Crittenden* court rejected the appellant's argument on its own terms, "because all except one of these prospective jurors were excused (almost all by the prosecutor), and the prosecutor's failure to excuse the remaining juror must be viewed in light of the circumstance that the juror was called later in the proceedings, when the prosecutor's remaining peremptory challenges were few." (*Id.* at p. 119.) Also, in *People v.*

Jones (1998) 17 Cal.4th 279, 295 [70 Cal.Rptr.2d 793, 949 P.2d 890], the court addressed the defendant's comparative analysis claim that other prospective jurors who were not Black had expressed doubts about the death penalty but were impaneled anyway. It rejected the claim on its merits, finding sufficient evidence in the record to support the trial court's refusal to find a prima facie case.

It is also important to emphasize that the cases in which the Supreme Court cautioned against the placing of undue emphasis on the appellate use of comparison analysis (*People v. Box, supra,* 23 Cal.4th 1153; *People v. Turner, supra,* 8 Cal.4th 137; *People v. Montiel* (1993) 5 Cal.4th 877 [21 Cal.Rptr.2d 705, 855 P.2d 1277]; *People v. Johnson, supra,* 47 Cal.3d 1194) were ones in which the trial court called for, received and accepted a race-neutral explanation from the attorney whose challenges were questioned. The important question in those cases was not whether a prima facie case of group bias had been established, but whether counsel's explanation was credible. The Supreme Court admonished against the excessive appellate use of comparison analysis in those cases because it related to the ultimate determination of bias and could not be squared with the deference that had to be accorded a trial court determination of the credibility of a proffered explanation. For example, in *People v. Montiel,* the prosecutor analyzed the views of challenged and unchallenged members of the venire and the trial judge made a "sincere and reasoned effort" to evaluate the nondiscriminatory justifications he offered. "In such circumstances," the Supreme Court stated, "an appellate court will not *reassess* good faith by conducting its own comparative juror analysis." (5 Cal.4th at p. 909, italics added.) A very different situation is presented, however,

where, as in the matter before us, the trial judge neither received from counsel nor itself provided any racially neutral explanation but nonetheless refused to find a prima facie case of group bias. The issue here is neither the credibility of a racially neutral explanation nor the ultimate question of bias, but merely the *appearance* of such bias as would *call* for an explanation. Where reasons for a questioned challenge are not required by the trial court or offered by counsel, a reviewing court will often be unable to reasonably determine whether the *Wheeler* rule has been violated without some examination and comparison of the voir dire testimony of excluded and nonexcluded jurors. Barring *any* appellate use of such comparisons in those cases would materially compromise the ability of reviewing courts to intelligently evaluate the denial of *Wheeler/Batson* claims. In light of the importance of appellate review to a correct criminal adjudication (*Griffin v. Illinois* (1956) 351 U.S. 12, 18 [76 S.Ct. 585, 590, 100 L.Ed. 891, 55 A.L.R.2d 1055]), inadequate state appellate review might undermine the presumption of the correctness of state court rulings indulged by federal courts in habeas corpus proceedings (28 U.S.C. § 2254(d)), and leave to the federal courts the enforcement of an important right arising not just under the United States Constitution but independently under our own Constitution. (See, *Burks v. Borg* (9th Cir. 1994) 27 F.3d 1424, 1428.)

We do not think our Supreme Court contemplates any abdication of state judicial responsibilities. *Wheeler* implicitly acknowledges that the exclusion of jurors on the basis of race "condones violations of the United States Constitution [and our own Constitution] within the very institution entrusted with its enforcement, and so invites cynicism respecting the jury's neutrality and its obligation

to adhere to the law." (*Powers v. Ohio* (1991) 499 U.S. 400, 412 [111 S.Ct. 1364, 113 L.Ed.2d 411].) In the light of this danger, judges must be vigilant and assertive. As stated in *Wheeler,* "the courts cannot be pacifists" in the "war" between racial discrimination in jury selection and our basic concepts of a democratic society. (*People v. Wheeler, supra,* 22 Cal.3d at p. 280.) The *Wheeler* rule is meaningless unless a trial court finding that a prima facie case of racial or group bias has not been established is subject to meaningful review. Where such a finding is unexplained by the trial court or by counsel, a reviewing court must be able to examine all the relevant evidence, including a comparison of the voir dire testimony of excluded and nonexcluded jurors.

It is also necessary to remember that *People v. Howard, supra,* 1 Cal.4th 1132, 1155 states that judicial review of a defendant's attempt to establish a prima facie case is not limited to a review solely of counsel's presentation at the time of the motion in order to ensure that even if the defendant's showing is inadequate, there are no "other circumstances" which might support a finding of a prima facie case. Courts of Appeal have lamented that by relieving trial courts of the need to provide a rationale for a no prima facie case finding, and requiring appellate courts to examine the entire record in search of a justification, the Supreme Court has in effect compelled reviewing courts "to move into the realm of speculation concerning why a party 'may' have a reason to challenge a juror other than his or her membership in a cognizable group." (*People v. Trevino* (1997) 55 Cal.App.4th 396, 409 [64 Cal.Rptr.2d 61].) As one court has stated, "where a defendant fails to make a prima facie case and, because of that, the prosecutor has not been called upon to state race-neutral reasons

for exercising a peremptory, the appellate court, under the position taken by the California Supreme Court in *Howard,* is placed in the almost untenable position of culling from the record possible race-neutral reasons for excusal." (*People v. Walker, supra,* 64 Cal.App.4th 1062, 1069; accord, *People v. Buckley, supra,* 53 Cal.App.4th 658, 667 ["It is clearly uncomfortable for an appellate court to postulate hypothetical reasons a prosecutor might have challenged each juror."].) Needless to say, the problem created by *Howard* would be immeasurably exacerbated, and it would be irrational and unfair, if a comparison of the voir dire testimony of challenged and unchallenged members of the venire were excluded from the "other circumstances" reviewing courts have been required by the Supreme Court to examine.

For the foregoing reasons, we conclude that in a case such as this a reviewing court may examine and compare the voir dire testimony of those members of the venire excluded from the jury and those who were not, provided such evidence is not "one-sided," "highly speculative" or "unduly emphasized" (*People v. Johnson, supra,* 47 Cal.3d at pp. 1220 1221), but solid and persuasive.

With these thoughts in mind, we proceed to consider the voir dire testimony and other evidence appellant relies upon in arguing that the trial court erred in finding he did not establish a prima facie case of group bias. We preface our analysis, however, by noting that the prosecution's use of peremptory challenges removed all African-Americans from the jury, and in *People v. Sanders, supra,* 51 Cal.3d at page 500, the Supreme Court indicated that this *alone* "may give rise to an inference of impropriety." (Accord, *U.S. v. Chinchilla, supra,* 874 F.2d 695, 698, fn. 4; *U.S. v.*

Thompson (9th Cir. 1987) 827 F.2d 1254, 1256-1257; *U.S. v. Alcantar* (9th Cir. 1987) 832 F.2d 1175, 1177.)

Clodette T.

Clodette T.'s juror questionnaire revealed she was 42 years old, had been divorced for 11 years, had no children, and had lived in Richmond for 10 years. She had been employed in an administrative job at IBM for nine years, had attended some regular college and was a graduate of business college. She had served on a civil jury in a medical malpractice case, and that jury had reached a verdict. This was a positive experience for her. Question 20 asked, "Do you have a favorable, neutral, or unfavorable opinion of your African-American or black co-workers?" She responded: "Being an African-American myself, I am favorable." None of her other answers contained information that would give pause to either side.

During oral questioning, Ms. T. stated that her house had been "robbed" five or six years ago and that no arrest had been made for it. In examining Ms. T.'s questionnaire, the trial court noted that she had omitted answers to questions 57 and 58 (out of a total of 64 questions, spanning 17 pages) asking for her opinions about prosecuting attorneys and criminal defense attorneys. Ms. T. said she made a mistake in omitting answers to those questions, but did so only because she had no opinions on those topics. In the six or so other questions asked, Ms. T. gave no answer that would provide a race-neutral reason for finding her unsuitable as a juror. Indeed, the court asked only 10 questions in all, and the prosecutor declined the court's invitation to ask follow-up questions.

No basis other than race appears for the prosecutor's peremptory challenge of Ms. T. Her name was never

mentioned by counsel or the court during argument on either of the *Wheeler* motions. The fact that she left questions 57 and 58 blank cannot be credited as a valid justification in light of the fact that the same thing was done by white juror no. 7 (questionnaire no. 50) who also explained he had no opinions on the subject of those questions, and by white juror no. 10 (questionnaire no. 89).

Ms. T.'s answer to question 20 that she had a favorable opinion of African-American co-workers cannot be credited as a valid reason for the peremptory challenge. The only factor that distinguishes her from the many other jurors who gave the same answer is that she is African-American. White juror no. 3 (questionnaire no. 47), Hispanic/Latino juror no. 6 (questionnaire no. 78), and white juror no. 8 (questionnaire no. 10) all answered that they had favorable opinions of their African-American co-workers, and none was challenged by the prosecutor.

Sara E.

Sara E.'s questionnaire revealed that she was 36 years old, had never been married, and had lived in West Contra Costa County for 19 years. She had worked for Pacific Bell for 13 years, performing wiring for telephone service. Her car had been broken into five years before. She had served on a criminal jury in a robbery case in the early 1980's and that jury had reached a verdict. Question 63 asked a prospective juror whether filling out the questionnaire changed his or her attitude in any way about sitting as a juror in this case. She wrote: "I had no feelings one way or the other about sitting as a juror until I found out who the victim was. I am deeply saddened that it was an eighteen month old child. Based on the evidence brought forward, I

will not allow my emotions to get in the way of the verdict." (Underscoring in original.)

During questioning on voir dire, the court mentioned that Ms. E. had failed to answer question 30, which asked whether she or a family member had ever been arrested. Ms. E. responded that one of her parents had been arrested for robbery in another location over 35 years ago. As previously mentioned, Ms. E. was 36 years old. She knew nothing about how the police or district attorney had treated her parent.

Written question 40 inquired whether the fact that this case involved an allegation of murder and child abuse of an 18-month-old child would affect the juror's ability to be fair and impartial. Ms. E. wrote "don't know." The court asked how she felt about that now, and she replied that she could be fair and impartial.

Declining the court's explicit invitation to ask follow-up questions, the prosecutor immediately challenged Ms. E. At that point, defense counsel made his first *Wheeler* motion.

With regard to Sara E., the trial court cited the following factors in refusing to find a prima facie case: (1) She failed to answer question 30 on the written questionnaire regarding an arrest in the juror's family; (2) her parent had been arrested for robbery over 35 years ago; and (3) she wrote on the questionnaire that because of the child abuse facts, she didn't know if she could be fair and that she had emotions and feelings which may have

caused concern.[4] The court stated: "Even through the answers tend to lean in the favor of the prosecution in the case, neither side would want a juror deciding a case based upon emotions, rather than the facts and the evidence."

Appellant contends that this explanation for the court's refusal to find a prima facie case of group bias ignores and is inconsistent with several highly relevant circumstances. He argues, first, that omitting an answer on a 17-page, 63-item questionnaire could not possibly be deemed a legally valid, race-neutral reason for challenging Ms. E. in light of the fact that white members of the venire who failed to answer questions served on the jury without objection from the district attorney.

The arrest of Ms. E.'s parent over 35 years ago, when Ms. E. was an infant, cannot fairly be considered a race-neutral reason for her challenge, appellant argues, because the prosecutor failed to challenge several whites who served on the jury who themselves or whose families were much more recently the subject of criminal charges. Juror no. 9's brother was arrested for battery on a police officer just three years earlier. The brother of alternate juror number 1 was arrested for statutory rape seven years earlier. Finally, three other seated jurors had

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[4] In defense of the trial court's ruling, the dissent mentions as an additional justification the fact that Sara E. answered "yes" to question 28: "Do you have any legal training or have you taken any law courses?" The same answer was given by juror number 11, who was not challenged. The trial court attached so little significance to Sara E.'s answer that it did not query her on it during voir dire, whereas juror no. 11 was questioned at length about her legal training and experience (pre-law as an undergraduate; worked at law firm in high school and college).

themselves been arrested for driving under the influence of alcohol or a related charge.

Appellant argues that the trial court mischaracterized Ms. E.'s written response "don't know" to question 40, which inquired whether there was anything about the nature of the charges that caused her to question her ability to be fair and impartial. The court characterized this answer as saying Ms. E. didn't know if she could be fair. But this discounts Ms. E.'s clarification of the ambiguity of her written answer by her oral statement to the court that she believed she could be fair and impartial. Further, as might be expected, Ms. E. was hardly the only member of the venire to initially express an emotional reaction to child abuse charges. Answers to the questionnaire given by numerous other jurors, both female and male, also indicated abhorrence of child abuse but, like Ms. E., later orally affirmed that they could nonetheless be fair and impartial, and were not challenged by the prosecution.

Considering the record in its entirety, and giving particular weight to the considerations our Supreme Court identified as relevant in *Wheeler*,[5] we determine that

[5] With respect to the type of evidence that may be used to establish a prima facie case of group bias, the *Wheeler* court stated that the moving party "may show [1] that his opponent has struck most or all of the members of the identified group from the venire, or [2] has used a disproportionate number of his peremptories against the group. [3] He may also demonstrate that the jurors in question share only this one characteristic – their membership in the group – and that in all other respects they are as heterogeneous as the community as a whole. [4] Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same

(Continued on following page)

appellant established a prima facie case that the prosecution's use of peremptory challenges to excuse Clodette T. and Sara E. reflect group bias.[6] The prosecutor struck all African-Americans on the venire; used a disproportionate number of his peremptory challenges against members of that racial group (3 out of 3 or 100% of the African-Americans, versus 9 out of 40 or 22% of the other prospective jurors);[7] completely excluded African-Americans from the jury; failed to engage in any questioning whatsoever of any prospective African-American juror despite invitations to do so from the court, and despite a warning to the district attorney that his conduct seemed "very close" to a *Wheeler* violation. In addition, two of the three African-American members of the venire (Sara E. and Ruby L.) were peremptorily challenged immediately after the trial court completed its routine questioning. Finally, as earlier discussed, the record is bereft of any race-neutral explanation for these challenges. Nothing in the oral or written responses on voir dire of Clodette T. and Sara E., or anything else in the record, significantly differentiates

jurors in more than desultory voir dire, or to ask them any questions at all." (*People v. Wheeler, supra*, 22 Cal.3d at pp. 280-281, fn. omitted.)

[6] A new trial is required if there was a prima facie case of a *Wheeler* violation as to *even one* of a cognizable group of prospective jurors. (*People v. Montiel, supra*, 5 Cal.4th 877, 909; *People v. Fuentes* (1991) 54 Cal.3d 707, 716, fn. 4 [286 Cal.Rptr. 792, 818 P.2d 75].) Accordingly, our finding of a prima facie case as to Ms. T. and Ms. E. makes it unnecessary to review the validity of the peremptory challenge to Ruby L., the third and last potential African-American juror, who the trial court seemed to believe might be unable to fully understand the proceedings.

[7] The prosecutor exercised a total of 12 peremptory challenges, defense counsel exercised 16 such challenges.

them from members of the venire who served on the jury. Nor is there anything in their testimony suggesting they would be hostile to the prosecution; indeed, as the court observed, Sara E.'s answers "tend to lean in favor of the prosecution." We are, in short, unable to find any basis in the record for the trial judge's stated conclusion that "[t]he People are not exercising challenges based on group bias, rather than individual bias."

It appears to us that the court's determination that appellant failed to establish a prima facie case of group bias was based not on the existence of a persuasive race neutral explanation – because neither the district attorney nor the court produced such a reason – but on the belief that the presumption a party exercising a peremptory challenge is doing so on a constitutionally permissible ground can be rebutted only on a stronger showing of group bias than a reasonable inference. But, as we have explained, that theory, which is at the heart of the opinion in *People v. Bernard, supra,* 27 Cal.App.4th at page 465, has been repudiated by the Supreme Court. For purposes of establishing a prima facie case of a *Wheeler* violation, an inference is "reasonable," or a likelihood "strong" if the record provides no *apparent* race-neutral reason for exercising a peremptory challenge. That is the case here.

The trial court's refusal to find a prima facie case ended the inquiry before the prosecutor would have been required to provide justification for his challenges. If the prosecutor had a reasonable race neutral explanation for peremptorily challenging these two members of the venire, it simply does not appear in the record. When, as here, no prima facie case is found and thus no explanation given, the reviewing court is left to speculate about possible explanations which, in this case, are not readily apparent.

It may reasonably be inferred from the record that the district attorney excluded Clodette T. and Sara E. because of their race, as that is the only discernible difference between these members of the venire and those who served on the jury. As earlier noted, in reviewing California trial court compliance with *Wheeler,* which it treats as the functional equivalent of *Batson* (*McClain v. Prunty, supra,* 217 F.3d 1209, 1216, fn. 2; *Tolbert v. Page, supra,* 182 F.3d 677, 679 (en banc)), the Ninth Circuit has repeatedly declared that peremptory challenges "cannot be lawfully exercised against potential jurors of one race unless potential jurors of another race with comparable characteristics are also challenged." (*McClain v. Prunty, supra,* 217 F.3d at p. 1221; *Turner v. Marshall, supra,* 121 F.3d 1248, 1251.) That test has not been met in this case. By unjustifiably relieving the district attorney of the responsibility to provide a race-neutral explanation for these exclusions, the trial court abused its discretion and a new trial is therefore required. (*People v. Montiel, supra,* 5 Cal.4th at p. 909; *People v. Fuentes, supra,* 54 Cal.3d at p. 716, fn. 4.)

This might easily have been avoided. "The procedure designed in *Wheeler* to prevent racial discrimination in jury selection, and preserve public confidence in our courts, is not onerous. Ordinarily it takes but a few moments for a party who uses a peremptory challenge to explain why an objecting adversary has failed to establish a prima facie case or, if the court finds a prima facie case has been established, to provide a racially neutral explanation for the challenge if this can be done. Trial courts should not lightly relieve counsel of these important responsibilities, either by too readily accepting vague explanations (see, Colbert, *Challenging the Challenge:*

Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges (1990) 76 Cornell L.Rev. 1 at pp. 97-98; Bell, Race, Racism and American Law (3d ed. 1992) § 5.16.4, p. 383) or, as appears to have occurred here by elevating the 'strong likelihood' standard to a level that can rarely be met by trial counsel, who are ordinarily in the difficult position of having to prove a negative, and must do so without the opportunity for preparation in advance under the considerable pressures imposed by trial proceedings." (*People v. Buckley, supra,* 53 Cal.App.4th at pp. 681-682 (dis. opn. of Kline, P. J.), fn. omitted.)

II.*

Appellant has challenged a number of evidentiary rulings, which we will briefly address for purposes of guidance in the event of retrial. Since our purpose is only to provide guidance for the future, we do not address claims about whether objections were properly raised and preserved. Nor do we address appellant's claim that the prosecutor committed misconduct by switching theories as to the instrumentality of death, because this does not involve an evidentiary ruling. We trust this matter can be addressed in appropriate in limine motions prior to trial.

A.

The Pertinent Facts

The murder victim, 19-month-old Janika Price, and her mother Jennifer Shelton were living with appellant,

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* See footnote *, *ante*, page 318.

his two- and three-year-old sons, and his aunt Linda Green and her son. Appellant was not Janika's father. Shelton had known appellant for six or seven months and had moved in with him, but it was not a good relationship. Appellant was physically abusive to Shelton and beat her frequently.

On February 19, 1996, appellant and Shelton argued about Janika. Shelton complained that appellant played too roughly with Janika. Appellant accused Shelton of spoiling Janika. Appellant hit Shelton in the face, kicked her in the foot, and kicked her again as she lay on the floor. When appellant left, Shelton fell asleep in the bedroom. She woke up when she heard Janika crying. The crying was unusual and sounded like Janika was hurt. A few minutes later, Shelton went into Janika's room and found her lying on her bed with her face to the wall. Shelton leaned down to kiss Janika and noticed she was pale and wheezing. Shelton asked appellant whether something was wrong with Janika. Appellant said Janika had thrown up, and he had cleaned her up and put her in bed. Shelton picked Janika up, discovered she was limp, and brought her into the living room.

Shelton called 911. In the meantime, appellant came in, picked up Janika, and gave her some water. Janika drank the water, but went limp again. Paramedic Robert Duvall arrived at 10:31 p.m., within three minutes of the 911 call. He asked what had happened, and appellant told him Janika had fallen out of her crib around 4:00 p.m. but had been fine until the 911 call. Duvall observed a bruise on her forehead that was consistent with a fall. There was light bruising and some vomit on her chest. She had no blood pressure or pulse, and her pupils were fixed and dilated. Janika had been dead for at least six minutes.

Dr. Brian Peterson, who performed the autopsy on Janika, testified that the cause of death was blunt force injuries to the chest, causing the heart to rupture. Such injury would cause death within a minute or so. There could be vomiting within this period. Janika's body had other injuries, scars, and bruises that indicated a pattern of child abuse. According to Dr. Peterson, it would take a substantial amount of force, such as a hard punch or a sharp kick, to cause the heart to rupture. Dr. Peterson likened the amount of force to that which an unrestrained driver would suffer in an automobile collision at freeway speed. Accidentally stepping on the child would not have been sufficient to cause the fatal injury.

Detective David Krastof testified that he interviewed appellant twice at the police station on February 20, after Krastof had met with Dr. Peterson. The first interview was videotaped, but only the sound portion was recorded correctly. The second interview was fully videotaped. Both tapes were played for the jury.

In his first interview, appellant initially denied having had a fight with Shelton on the night of Janika's death, but later admitted they had an argument. Appellant said nothing about hitting Shelton. Appellant said he was putting up some posters in the children's room while Janika played with his sons. Janika threw up on her bed. Appellant cleaned her up. Shelton came in, said Janika was not breathing right, and took her into the other room. Appellant claimed he performed cardiopulmonary resuscitation (CPR) on Janika after she stopped breathing, but did so by applying only light pressure. When Krastof said appellant's story did not match reports from the pathologist, appellant asked for a lawyer. Krastof placed appellant under arrest.

A few hours later, after talking to his mother, appellant said he wanted to resume talking. In this second videotaped session, appellant admitted he had a violent fight with Shelton. He dragged Shelton by her hair into the bedroom, slapped and kicked her and then went into the kids' room to clean up. When Janika threw up, appellant cleaned her face and put her down. Shelton came in a little later, picked up Janika, and noticed she was not breathing right. Appellant looked at Janika, gave her some water, and she stopped breathing. Appellant put Janika on the table, breathed into her mouth, and hammered on her chest, twice, "pretty hard."

Krastof advised appellant his story was not consistent with the medical evidence. Appellant then said he had been chasing a rat around the kids' room. While chasing the rat, he accidentally stepped on Janika's chest. He picked her up. She was screaming, but she seemed fine. She threw up right after he put her on the bed. Appellant insisted he did not kick Janika. Krastof insisted the evidence showed otherwise, and appellant eventually changed his story to say that he had accidentally kicked Janika in the chest when he backed up. Appellant said: "I did kick her. . . . I didn't know I kicked her until I explained myself just now, when I jumped back." Appellant said he lied initially because he did not want to be seen as a murderer. Appellant continued to insist that his kicking Janika's chest was an accident.

Detective Krastof saw some small bruise marks on Janika's forehead. He located appellant's BB gun under a boat at a residence two houses away and fired it at the arm of another officer. Krastof testified that the marks made by the BBs on the officer's arm were similar to the marks on Janika's face.

Appellant testified in his own defense. In the early evening on February 19, 1996, he and Shelton had a fight in which he grabbed her by the hair, knocked her down, and kicked her a couple of times. He admitted that he had been violent with Shelton before. After the fight he went into the children's room to put up some posters and clean it. All three children were there. As he moved the boys' bed, he saw a rat. Appellant put Janika on the bed and asked the boys to help him catch the rat that had run into the closet. He got a BB gun to shoot the rat. The boys shook the clothes, and the rat ran out. Appellant jumped back as the rat came toward him and stepped on Janika. Janika screamed, and he picked her up to console her.

Several minutes later, Shelton came into the room and said Janika was not breathing right. Appellant's aunt, Linda Green, said the same thing a few minutes later. Appellant went into the living room where Shelton told him Janika was not breathing. Appellant picked up Janika and gave her some water. Janika stopped breathing and went limp. Appellant told his aunt to call an ambulance and began doing CPR. Appellant hit Janika on the chest, trying to "jump start" her heart, as he had seen it done on television. Appellant denied ever physically abusing or intentionally hurting Janika. He also denied ever shooting her with a BB gun.

Appellant's aunt Linda testified that she had heard the fight in the bedroom, had seen appellant and the boys chasing a mouse, and had previously seen mice in the apartment. She did not hear Janika cry. She confirmed that Janika was breathing "funny," that appellant gave her some water, after which Janika went limp. Appellant tried to administer CPR and hit Janika in the chest in doing so.

To dispute the timing of events provided by defense witnesses, the prosecution offered the rebuttal testimony of appellant's next-door neighbor, Terry Davidson. He heard physical fighting and a woman scream, "[y]ou killed her," "[o]h my God, she's dead." The police arrived 15 to 20 minutes later.

To rebut appellant's claim that he would not let anything happen to his boys, the prosecution offered the testimony of Tammy Keller, the cousin of appellant's ex-wife. Keller testified that appellant walked in, uninvited, to the apartment she was sharing with appellant's ex-wife on August 27, 1993. He seemed very upset. When the ex-wife called, appellant got on the phone and became even more angry and started screaming, even though the boys were asleep. Appellant ignored Keller's request to lower his voice and instead proceeded to urinate in the sink on her dishes. The third time she asked him to lower his voice, he ripped the phone out of the wall. Appellant then went on a rampage. He picked up his son, Jay, Jr., and carried him like a football. While still holding the child, appellant threw a fish tank through a window, broke the glass coffee table, and tried to throw the television set out the window. Appellant bumped Jay's head on the door frame and on the television set. Keller tried to stop appellant from leaving with Jay, Jr., but appellant pushed past her.

B.

The Videotaped Interviews

Appellant contends the trial court erred in admitting the lay opinions of officers Krastof and Cope contained in the videotapes in which they repeatedly stated their

opinions that appellant was lying. A police officer's personal opinion regarding the credibility of an interviewee generally is inadmissible either as lay testimony or as expert testimony and should have been redacted upon proper objection. (*People v. Melton* (1988) 44 Cal.3d 713, 744; *People v. Smith* (1989) 214 Cal.App.3d 904, 915-916; *People v. Sergill* (1982) 138 Cal.App.3d 34, 40.)

C.

Impeachment of Jennifer Shelton

Defendant moved to exclude testimony by Jennifer Shelton as to his prior acts of domestic violence on her because the current trial pertained only to the death of Janika Price. He was convicted in the prior trial of battery on Jennifer Shelton based on the beating he inflicted immediately before Janika's death. The trial court, however, ruled that the evidence of prior abuse would be admissible to explain why Shelton changed her testimony between the preliminary examination and the first two trials.

Shelton testified on direct examination at the current trial as follows: Appellant had physically assaulted her about once a week during the six or seven months they lived together. When she testified at the preliminary examination, her testimony, which was supportive of appellant, was not totally truthful because she did not believe that appellant could do something that "hateful." She further testified that appellant had a "temper."

Appellant correctly contends that this evidence was inadmissible on the ground stated. Reference to Shelton's preliminary hearing testimony was inadmissible hearsay. It was not admissible under Evidence Code section 1235 as

a prior inconsistent statement because there was no inconsistency. Shelton admitted in her testimony at the current trial that her preliminary hearing testimony was false. Thus, it would only have been admissible as a prior consistent statement under Evidence Code section 1236 if her credibility had been challenged, which it had not. (Evid. Code, §§ 1236, 791.) It was improper bootstrapping to introduce the otherwise inadmissible history of domestic violence for the purpose of explaining Shelton's preliminary hearing testimony which was inadmissible and irrelevant.

D.

Testimony of Tammy Keller

Appellant contends that the court erred in allowing Tammy Keller to testify on rebuttal about his trashing his ex-wife's apartment. Keller was the cousin of appellant's ex-wife, Holly Eastman, who was the mother of appellant's two sons. She testified that she was living with Holly and her two children on August 27, 1993, when appellant came over while Holly was not there. Appellant spoke to Holly on the telephone and argued with her. After that, appellant went on a rampage. He ripped the telephone out of the wall and urinated on the dirty dishes in the kitchen sink. Appellant picked up his son and carried him under his arm. He threw a fish tank through the window, broke the glass coffee table, and tried to throw the television through the window. During the course of this, appellant accidentally bumped the child's head on the door and on the television.

The trial court ruled that Keller's testimony was admissible to impeach appellant's testimony that "Jay and

Justin knew I'm not going to let nothing happen to them. Any time they with they daddy, they know they're protected." We agree with appellant that the evidence should have been excluded under Evidence Code sections 352 and 1101 in that its minor probative value was far outweighed by the prejudicial effect.

E.

The BB Gun Experiment

Appellant contends that the trial court erred in allowing officer Krastof to testify that the bruise marks on Janika's face appeared similar to the marks caused by shooting a fellow officer with a BB gun. We agree. A witness may not give expert testimony on an experiment without a showing that the witness has the necessary expertise. "The proponent of experimental evidence bears the burden of production and proof on the question whether such evidence rests on an adequate foundation." (*People v. Bonin* (1989) 47 Cal.3d 808, 847.) "Admission of such evidence depends upon proof of the following foundational items: (1) The experiment must be relevant; (2) it must have been conducted under at least substantially similar, although not necessarily absolutely identical, conditions as those of the actual occurrence; (3) the qualifications of the individual testifying concerning the experimentation must be demonstrated with some particularity; and (4) evidence of the experiment will not consume undue time, confuse the issues, or mislead the jury." (*People v. Turner, supra*, 8 Cal.4th at p. 198.)

Here, there was no showing that officer Krastof had any training, experience, or expertise regarding BB gun strike marks. Nor was there any showing of expertise to

qualify him to give an opinion on whether an injury on an adult's arm resembles another injury on a child's face.

III.

DISPOSITION

The judgment is reversed.

Lambden, J., concurred.

HAERLE, J. – For at least four different reasons, I respectfully but strongly dissent.

1. First of all, the majority apparently believes that footnote 7 in our Supreme Court's opinion in *People v. Box* (2000) 23 Cal.4th 1153, 1188 [99 Cal.Rptr.2d 69, 5 P.3d 130] (*Box*), signals a major shift from its previous position regarding the applicable test under *People v. Wheeler* (1978) 22 Cal.3d 258 [148 Cal.Rptr. 890, 583 P.2d 748] (*Wheeler*) and *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69] (*Batson*). I disagree; clearly, all our Supreme Court was saying by that footnote was: "these two terms mean the same thing to us and always have, so what's all the fuss about?"

That fuss was, as the majority suggests, the result of an opinion of a panel of the Court of Appeals for the Ninth Circuit, *Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190 (*Wade*). While affirming a lower court's denial of a petition for a writ of habeas corpus, *Wade* spent considerable space gratuitously suggesting that past California Supreme Court opinions had differentiated between the two standards and had, erroneously, applied only the "'strong

likelihood'" standard.[8] (*Wade, supra,* 202 F.3d at pp. 1195-1198.)

The *Wade* opinion appeared in print in February 2000, after *Box,* a capital case, had been fully briefed.[9] Obviously, our Supreme Court wanted to promptly reassure the lower courts of this State that, the Ninth Circuit panel to the contrary, it knew what it was doing regarding the *Wheeler*/*Batson* standard, and it opted to do so in both a prompt and succinct way via footnote 7 of *Box.* The majority treats this as some sort of major event. This is plainly incorrect. Indeed, the Court specifically noted in that footnote (as, also, had the Ninth Circuit panel in *Wade*) that even as early as *Wheeler* (which, of course, preceded the United States Supreme Court's *Batson* decision by eight years), *both* terms were used synonymously within a

[8] The extended essay offered by the Ninth Circuit panel was unnecessary to its result because it ultimately affirmed the federal district court's denial of a petition for a writ of habeas corpus. That denial and affirmance brought to an end an attack on the Contra Costa Superior Court's handling of a *Wheeler* motion set forth in detail in our decision in *People v. Buckley* (1997) 53 Cal.App.4th 658 [61 Cal.Rptr.2d 860] (*Buckley*). In *Buckley,* with Presiding Justice Kline dissenting, we upheld the trial court's ruling that that appellant had not established a prima facie case that the prosecution's challenges were based on race. Our Supreme Court denied review in *Buckley* (see 53 Cal.App.4th at p. 683), and our opinion has been cited several times by other appellate courts dealing with appeals of *Wheeler* challenges. (See, *People v. Walker* (1998) 64 Cal.App.4th 1062, 1069 [75 Cal.Rptr.2d 871]; *People v. Trevino* (1997) 55 Cal.App.4th 396, 409-410 [64 Cal.Rptr.2d 61] and *Birdine v. Hubbard* (N.D.Cal. Aug. 21, 2000, No. C99-037MJJ) 2000 WL 1229112, p. 3, the latter being a post-*Wade* denial of a petition for a writ of habeas corpus sought on *Batson* grounds.)

[9] Appellant's reply brief in *Box* was filed January 24, 2000.

page of one another. (See *Wheeler, supra,* 22 Cal.3d at pp. 280-281; *Wade, supra,* 202 F.3d at p. 1196.)

The long and short of all this is that, the majority of this court and *Wade* to the contrary, our Supreme Court has been using the *Batson* standard all along, and footnote 7 in *Box* did not signal any change on that issue. Additional proof of that fact came in an opinion authored by Justice Mosk and filed a few days after *Box.* (*People v. Ayala* (2000) 24 Cal.4th 243, 260 [99 Cal.Rptr.2d 532, 6 P.3d 193].) As the majority points out in its footnote 3, in the course of that decision the Court quoted from *Box* and, in so doing, put the term "reasonable inference" in brackets after the term "strong likelihood." I don't know how that Court could have signaled more emphatically that, in its view, the two terms do now, and always have, meant the same thing.

The majority, however, is obviously not persuaded. Relying upon various and sundry dictionary definitions of the relevant terms and, even more importantly, repeated citations to federal, especially Ninth Circuit, authority, the majority contends, at least as I understand matters, that both the *Box* footnote and the bracketed phrase in *Ayala* are substantially inexplicable.[10]

[10] The majority also contends that, previously, the Court differentiated between the concepts of "strong likelihood" and "reasonable inference." It argues that in *People v. Sanders* (1990) 51 Cal.3d 471, 500 501 [273 Cal.Rptr. 537, 797 P.2d 561] (*Sanders*), the Court expressed "the belief that a 'strong likelihood' of group bias requires greater evidence than a 'reasonable inference' of such bias. . . . " (Maj. opn., *ante,* at p. 327.) This is simply incorrect. The Supreme Court said no

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I remind my colleagues in the majority that, their strong and honest feelings notwithstanding, we are an intermediate appellate court that is bound to follow the rulings of our Supreme Court, even those we feel are not adequately explained. Thus, and because I have no difficulty understanding the (admittedly cursory) *Box* footnote, I think the majority errs in not following its clear direction.

2. Most unfortunately in my view, the majority opinion gives only lip service to the principle that an appellate court should pay deference to a trial court's ruling on a *Wheeler*/*Batson* motion. The majority briefly alludes to this principle (maj. opn., *ante*, at pp. 328-329), but immediately thereafter proceeds to pay no deference whatsoever to the trial court's ruling.

And it is not as if the direction to pay such deference has been vague: our Supreme Court has repeated it practically every time a *Wheeler* issue has been before it – which is a lot of times. Indeed, in the important case of *People v. Johnson* (1989) 47 Cal.3d 1194, 1221 [255 Cal.Rptr. 569, 767 P.2d 1047] (*Johnson*), where the Court disapproved of an earlier effort to modify the *Wheeler* standard (*People v. Trevino* (1985) 39 Cal.3d 667 [217 Cal.Rptr. 652, 704 P.2d 719]), the standard was articulated as one of "truly giving great deference" to the trial court. (*Johnson, supra,* 47 Cal.3d at p. 1221.) Most recently, in *People v. Jones* (1998) 17 Cal.4th 279, 294 [70 Cal.Rptr.2d 793, 949 P.2d 890], the Court stressed that "'"'[b]ecause

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such thing and, indeed, the term "reasonable inference" nowhere appears in the cited pages of *Sanders*.

Wheeler motions call upon trial judges' personal observations, we view their rulings with 'considerable deference' on appeal."'" To the same effect are the Court's holdings in *People v. Howard* (1992) 1 Cal.4th 1132, 1155 [5 Cal.Rptr.2d 268, 824 P.2d 1315], *People v. Crittenden* (1994) 9 Cal.4th 83, 117 [36 Cal.Rptr.2d 474, 885 P.2d 887], and *People v. Mayfield* (1997) 14 Cal.4th 668, 723 [60 Cal.Rptr.2d 1, 928 P.2d 485]. Even the United States Supreme Court, in its *Batson* opinion, pointedly acknowledged this principle. It said: "Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." (*Batson, supra,* 476 U.S. at p. 98, fn. 21 [106 S.Ct. 1712].)

Our Supreme Court elaborated on this rationale for the required deference in *Sanders, supra,* 51 Cal.3d 471: "We reiterate that ruling on *Wheeler* motions '"requires trial judges to make difficult and often close judgments. They are in a good position to make such determinations, however, on the basis of their knowledge of local conditions and of local prosecutors." [Citation.] They are also well situated to bring to bear on this question their powers of observation, their understanding of trial techniques, and their broad judicial experience. We are confident of their ability to distinguish a true case of group discrimination by peremptory challenges from a spurious claim. . . . ' (*Wheeler, supra,* 22 Cal.3d at p. 281, quoting Kuhn, *Jury Discrimination: The Next Phase* (1968) 41 So.Cal.L.Rev. 235, 295, fn. 5; see also *Johnson, supra,* 47 Cal.3d at pp. 1219-1222.) Applying this standard of giving considerable deference to the determination of the trial court, 'we see no good reason to second-guess [the trial court's] factual determination' (*Johnson, supra,* at p. 1221) that the

prosecutor was not motivated by bias against Hispanics." (*Sanders, supra,* 51 Cal.3d at p. 501.)

So, how much deference does the majority pay to this trial court's "powers of observation" which necessarily impact its "evaluation of credibility," its "understanding of trial techniques," or its "broad judicial experience"? The answer is disturbing: aside from a single mention of the word "deference" (maj. opn., *ante*, at p. 328), none at all. Thus, the majority (1) totally avoids the trial court's careful statement of its reasons for concluding that no prima facie case of discrimination was shown by the prosecution's peremptory challenge of prospective juror Ruby L. (maj. opn., *ante*, at p. 336, fn. 6) and (2) totally reevaluates, as if it were the trial court itself, the validity of that court's reasons for coming to the same conclusion regarding prospective juror Sara E. (maj. opn., *ante*, at pp. 334-336).

The apogee of the majority's second-guessing of the trial court regarding that potential juror concerns that court's verbal inquiry as to whether, in light of Sara E.'s ambiguous answer to a questionnaire inquiry, she could be fair and impartial. The majority says that the trial court "discount[ed] Ms. E.'s clarification of the ambiguity of her written answer by her oral statement to the court that she believed she could be fair and impartial." (Maj. opn., *ante*, at p. 335.) But it was *the trial court and not the majority* that saw and heard the answer from Ms. E. to its question and, therefore, *it is for that court and not us* to evaluate what weight, if any, to give to that answer. That is what the United States Supreme Court had in mind when it noted the ability of trial courts to "evaluat[e] . . . credibility" (*Batson, supra,* 476 U.S. at p. 98, fn. 21 [106 S.Ct. at p. 1724]) and what our Supreme Court meant when it

observed that trial courts have necessarily unique "'powers of observation.'" (*Sanders, supra,* 51 Cal.3d at p. 501, quoting *Wheeler, supra,* 22 Cal.3d at p. 281.)

3. Having substantially disregarded the principle of deference, the majority compounds its error by then indulging in a multitude of comparisons of the questionnaire answers of two of the three challenged jurors to those of prospective jurors of other races.

To its credit, the majority appreciates that it is navigating in, as far as California is concerned, uncharted water. It recognizes that appellant's challenge "rests in some measure [I would have said 'almost entirely'] on a comparison of the written and oral voir dire testimony of the African-Americans excused by the prosecution with that of other prospective jurors who were not excused, which appellant claims are materially indistinguishable. This requires us to consider whether and, if so, to what extent such comparisons may be used to show a prima facie case of group bias. Unfortunately, this is another area in which the application of *Wheeler* by the California courts has differed somewhat from federal judicial application of *Batson.*" (Maj. opn., *ante*, at p. 329.) The majority then goes on to indicate, once again, its clear preference for the federal approach, especially that espoused by the Ninth Circuit.

There is, the majority's implication to the contrary, nothing ambiguous about our Supreme Court's view of such comparative analyses. It has repeatedly admonished that such comparisons should not be undertaken by an appellate court. For example, in *People v. Turner* (1994) 8 Cal.4th 137 [32 Cal.Rptr.2d 762, 878 P.2d 521], in rejecting an appellant's challenge to a trial court finding of no prima

facie case of discrimination, the Court said: "Defendant argues, however, that this basis was insufficient here because the prosecutor did not excuse other non-Black jurors who displayed similar intellectual limitations. However, we have previously rejected a procedure that places an 'undue emphasis on comparisons of the stated reasons for the challenged excusals with similar characteristics of nonmembers of the group who were not challenged by the prosecutor,' noting that such a comparison is one-sided and that it is not realistic to expect a trial judge to make such detailed comparisons midtrial. [Citation.] [¶] . . . Moreover, 'the very dynamics of the jury selection process make it difficult, if not impossible, on a cold record, to evaluate or compare the peremptory challenge of one juror with the retention of another juror [who] on paper appears to be substantially similar.'" (*Id.* at pp. 169-170.) More recently, the Court said precisely the same thing in *Box* (23 Cal.4th at p. 1190), also in the context of a prima facie ruling. (See also *People v. Fuentes* (1991) 54 Cal.3d 707, 715 [286 Cal.Rptr. 792, 818 P.2d 75].)

The majority tries to avoid this rule by three patently fallacious devices. First of all, it interprets the "undue emphasis" phrase in the quoted passage from *Turner* as an invitation to put its foot in that door and try to open it further. In so doing, it carefully avoids discussing language in Supreme Court cases that make clear that the prohibition is *absolute*. Thus, in *People v. Montiel* (1993) 5 Cal.4th 877 [21 Cal.Rptr.2d 705, 855 P.2d 1277] (*Montiel*), the Court stated: "If the trial court makes a 'sincere and reasoned effort' to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. *In such circumstances, an appellate court will not reassess good faith by conducting its own comparative*

juror analysis. Such an approach would undermine the trial court's credibility determinations and would discount '"the variety of [subjective] factors and considerations,"' including 'prospective jurors' body language or manner of answering questions,' which legitimately inform a trial lawyer's decision to exercise peremptory challenges." (*Id.* at p. 909, italics added.)

Quoting this passage, the Court said even more recently: "Just as an appellate court *will not* compare the responses of rejected and accepted jurors to determine the bona fides of the justifications offered, so the trial court itself has no obligation to perform such an analysis. '[W]e fail to see how a trial judge can reasonably be expected to make such detailed comparisons mid-trial.' [Citation.] Moreover, as we have indicated, such an analysis is largely beside the point, because it ignores the legitimate subjective concerns 'that go into a lawyer's decision to select certain jurors while challenging others that appear to be similar [on the cold record].' [Citation.]" (*People v. Arias* (1996) 13 Cal.4th 92, 136, fn. 16 [51 Cal.Rptr.2d 770, 913 P.2d 980] (*Arias*), italics added.)

I suggest that two recent doses of "will not" from our Supreme Court cannot, the majority to the contrary, translate into "may."[11]

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[11] The majority carefully avoids discussing the "will not" language in *Montiel* and *Arias*, and doesn't even cite the latter case. It demonstrates its inattention (to be generous) to the language used in them by saying that "our Supreme Court has not precluded comparative analyses by reviewing courts but has simply declared that they should not place an '*undue emphasis*' on such an analysis." (Maj. opn., *ante*,

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Second, the majority argues that our Supreme Court's concern about comparative analyses obtains only in those cases where the prosecutor was either asked for or volunteered explanations concerning the questioned challenges, but does not apply in cases, such as this, where no such explanation was asked for or given. But there is absolutely no language in any of the cases cited by the majority even implying any such distinction. Indeed, several of the more recent cases containing the admonition against appellate courts engaging in comparative analyses were cases in which the trial court had ruled that no prima facie case had been established. (*Box, supra,* 23 Cal.4th at p. 1190; *People v. Turner, supra,* 8 Cal.4th at pp. 169-170.) Indeed, the only case relied upon by the majority where the admonition against comparative analyses *did not* arise in the context of a challenge regarding a prima facie case was *Johnson, supra,* 47 Cal.3d at page 1220.[12] This fact, plus the unequivocal statements in *Montiel* and *Arias,* combine to demolish the distinction so laboriously constructed by the majority.

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p. 330; majority's italics.) The majority to the contrary, I think the phrase "will not" is a pretty good hint of an intent to "preclude."

[12] Both *Montiel* and *Arias* are unclear regarding the precise procedural context of their rulings. In *Montiel,* the trial court asked the prosecutor for his reasons without indicating one way or the other if it felt the defense had made a prima facie showing. (*Montiel, supra,* 5 Cal.4th at pp. 907-910.) However, the Court hinted that, in such circumstances, it might infer a finding of a prima facie case (*id.* at p. 910, fn. 8). In *Arias,* there was no such inference because the trial court indicated it has "questions" about the defense's prima facie showing (indeed, the Court itself had doubts if such had been shown); nonetheless, the prosecutor was asked for and gave his explanations. (*Arias, supra,* 13 Cal.4th at pp. 133-139.)

Third, the majority suggests that perhaps our Supreme Court doesn't really mean what it says regarding comparative analyses because, in two decisions, the Court itself indulged in comparisons. The majority is flatly wrong. The passage from *People v. Crittenden, supra,* 9 Cal.4th at page 119, which the majority contends reveals an inconsistency in the Court's application of this rule (maj. opn., *ante,* at p. 330) does no such thing. As a simple reading of it demonstrates, the Court was simply noting that Crittenden's "comparison" argument was not even worth debating because (1) all but one of the non-African-American prospective jurors who expressed doubt about the death penalty were also excused by the prosecution and (2) the only one who wasn't was called "later in the proceedings, when the prosecutor's remaining challenges were few."[13]

The majority also suggests that a few sentences in *People v. Jones, supra,* 17 Cal.4th at page 295, demonstrates that the Court endorses comparative analyses. (Maj. opn., *ante,* at p. 330.) It is, I believe, constructive to quote the two sentences the majority relies upon: "The implication [of the defendant's argument] is that the Black prospective jurors were singled out for special scrutiny. On this record, however, we are constrained to disagree. There

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[13] In fact, in *Johnson, supra,* 47 Cal.3d at page 1220, the Court specifically noted, by way of support for its anti-comparison stance, that "the same factors used in evaluating a juror may be given different weight depending on the number of peremptory challenges the lawyer has at the time of the exercise of the particular challenge. . . . " *Crittenden,* in the passage quoted by the majority, was simply adopting this *additional reason for avoiding comparative analyses.*

is evidence to support the court's rulings on the four Black prospective jurors in question, enough to reject the defendant's claims of *Wheeler* error." (17 Cal.4th at p. 295.)

I simply do not understand how the majority can conclude from these three plain vanilla sentences that, contrary to its repeated and emphatic words in many other decisions, our Supreme Court in fact approves of comparative analyses of the handling of prospective jurors. Since its emphatic disapproval of the comparative analysis system espoused (and indeed undertaken) by the majority in *People v. Trevino, supra,* 39 Cal.3d 667 (see *Johnson, supra,* 47 Cal.3d at pp. 1220-1221), our Supreme Court's position has been unwaveringly negative on that subject. I hope very much that the majority in this case is not suggesting that we should return to the *Trevino* era of wholesale appellate adjudication on this subject. That is, nonetheless, the effect of its opinion. For that reason, if no other, I strongly urge the Supreme Court to grant review of the majority's decision.

4. Finally, I submit that the record before us contains ample justification for the trial court's ruling that no prima facie case had been established. It will be recalled that the ultimate ruling by the trial court under review here was as to the second defense *Wheeler* motion. That motion encompassed the prosecutor's peremptory challenges to three African-American jurors, Ruby L., Sara E., and Clodette T. The trial court made specific comments on the record regarding the apparent justifications for the challenges to the first two, Ruby L. and Sara E. It made no specific comment regarding Clodette T.

The majority takes these three in reverse order. As far as Ruby L. is concerned, it seems to believe that the trial

court's ruling regarding her is almost irrelevant. It buries its only reference to that ruling in a footnote 20 pages into its opinion (maj. opn., *ante*, at p. 336, fn. 6), even though appellant specifically made it a part of his appeal. The majority simply says that, as to this prospective juror, "the trial court seemed to believe [she] might be unable to fully understand the proceedings." (maj. opn., *ante*, at p. 336, fn. 6.) A slight understatement, I suggest; the trial court not only "seemed to believe" this, it clearly did and it was clearly right.

In addressing the challenge to this juror, which precipitated the second *Wheeler* motion, the trial court noted, among other things, that (1) "the Court had concerns with regard to her qualifications in this matter based upon her answers to the questionnaire," (2) Ruby L. had a sister who "had had drug charges," (3) "she herself felt that she had difficulty understanding things", and (4) her "answers on the questionnaire . . . would have justified a peremptory challenge by either side. . . ."[14]

In short, Ruby L. was a hopeless prospective juror from the prosecution's standpoint, and the trial court was clearly correct in ruling that its challenge of her neither raised nor contributed to the raising of a prima facie *Wheeler* issue. But the majority omits all this and, in so

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[14] The trial court was obviously referring to Ruby L.'s answers to such questions as 37(c), 38-40, and 61. In these, she admitted that, e.g., she could not follow instructions to judge the credibility of all witnesses, including peace officers, by the same standards, could only commit to "try" to follow CALJIC No. 1.00 "regardless of the consequences," and was not sure that she could be fair, given the nature of the charges and circumstances of the case.

doing, does a grave injustice to the trial court. We are, after all, reviewing *the entirety* of its ruling on the *Wheeler/Batson* issue. Put another way, the issue before us is, was the trial court correct in finding, *as to these three African-American jurors,* that no prima facie violation of *Wheeler* had been shown? But, apparently, because the record as to one of those three so clearly supports the trial court's ruling and, conversely, undermines the majority's position, that portion is consigned to the near-oblivion of a footnote and, even there, half-heartedly explained. I think this is quite inappropriate. Appellate courts regularly give parties to appeals before them a hard time when they cite only the favorable-to-them parts of the record. We should pay a trial court at least the respect of reciting the *full and complete basis* of its ruling before reversing it.

As to the remaining two prospective jurors, the majority paints with a broad brush by proclaiming that "the record is bereft of any race-neutral explanation for these challenges." (Maj. opn., *ante*, at p. 336.) The majority's own opinion shows that this is utterly wrong; most of the preceding four pages of its opinion are devoted to quarreling with the trial court over the proper weight to be placed upon and interpretation given to (1) Sara E.'s failure to answer question 30 regarding whether either she or a family member had ever been arrested, (2) the fact that one of her parents had, in fact, been arrested for robbery, (3) her "don't know" answer to a written question as to whether the fact that the case involved allegations of murder of a minor and child abuse would affect her ability to be fair and impartial.

But the strongest basis for the peremptory challenge to Sara E. came from her reluctant responses to the trial court's questioning of her regarding her failure to answer

question 30 on the questionnaire. That revealing dialogue went like this:

"THE COURT: . . . You or anybody close to you ever been arrested?

"Ms. E.: I can answer that.

"THE COURT: Was it you or someone else?

"Ms. E.: Someone else.

"THE COURT: How is that person related to you?

"Ms. E.: Parent.

"The Court: What was the person arrested for?

"Ms. E. I believe it was robbery.

"The Court: Was that in this county or someplace else?

"Ms. E.: Someplace else.

"The Court: And how long ago are we talking about?

"Ms. E.: Over thirty-five years ago."

In short, it took *six* questions from the trial court to elicit a full and complete answer to question 30 on the questionnaire. I respectfully suggest that, after that series of questions and answers, any prosecutor who opted to leave Sara E. "in the box" ought to consider a different career.

Also present in the record, although not cited by the trial court,[15] is the fact that Sara E. had had "legal training,"

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[15] We are, of course, permitted to review the record for "'grounds upon which the prosecutor might reasonably have challenged' the jurors

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clearly a "race-neutral" reason for rejecting a prospective juror. (See *People v. Crittenden, supra,* 9 Cal.4th at p. 119.) Additionally, and as noted by the majority, she stated in answer to one of the written questions that, although she would "not allow my emotions to get in the way of the verdict," she was "*deeply* saddened that [the victim in the case] was an eighteen month old child." I suggest that clearly there were more than ample reasons for the prosecution to peremptorily challenge Sara E. and that, by so doing, it did not raise a prima facie case of race discrimination.

Which leaves only Clodette T. As noted both above and by the majority, the trial court made no mention of its views regarding her in its ruling that no prima facie case had been shown. But a review of the record discloses, again as noted by the majority, that (1) she was childless (this case involved the death and alleged abuse of a minor),[16] (2) the police had made no arrest after the robbery of her home five or six years ago, and (3) she omitted to answer the two questions in the questionnaire dealing with her opinions of prosecuting and defending attorneys.

I submit that, giving the required deference to the trial court, it could reasonably have found that, considered

in question." (*People v. Howard, supra,* 1 Cal.4th at p. 1155; see also our opinion in *Buckley, supra,* 53 Cal.App.4th at p. 667.)

[16] A Ninth Circuit case the majority omits from its encomiums to that court says that "lack of family may have appeared relevant to the prosecutor in a case involving child abuse and reasonably could be deemed to constitute a non-discriminatory basis for striking the venireman." (*U.S. v. Lewis* (9th Cir. 1988) 837 F.2d 415, 417, cert. den. *Lewis v. United States* (1988) 488 U.S. 923 [109 S.Ct. 304, 102 L.Ed.2d 323].)

together with the ample justifications in the record for the challenges to Ruby L. and Sara E., the challenge to Clodette T. did not, either alone or in combination with the others, present a prima facie case of a violation of *Wheeler.*

[No. S097600. June 30, 2003.]

SUPREME COURT OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v.
JAY SHAWN JOHNSON, Defendant and Appellant.

COUNSEL

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OPINION

CHIN, J. – During jury selection, each party is entitled to a limited number of peremptory challenges. (Code Civ. Proc., § 231.) However, exercising peremptory challenges to remove prospective jurors solely because of group bias,

for example, on racial grounds, violates both the California Constitution (*People v. Wheeler* (1978) 22 Cal.3d 258 [148 Cal.Rptr. 890, 583 P.2d 748] (*Wheeler*)) and the United States Constitution (*Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69] (*Batson*)). Both *Wheeler* and, later, *Batson* established procedures for courts to follow when one party objects to the other party's peremptory challenges. Defendant contends that California's procedures violate *Batson* in two respects.

First, although both *Wheeler* and *Batson* require the objector to establish a prima facie case of discriminatory use of peremptory challenges before the other party must explain its challenges, *Wheeler* used two terms – "strong likelihood" and "reasonable inference" – to describe the necessary showing of group bias; *Batson* used the single term, "an inference of discriminatory purpose." (*Batson, supra,* 476 U.S. at p. 94 [106 S.Ct. at p. 1712]; *Wheeler, supra,* 22 Cal.3d at pp. 280-281.) Defendant argues that the "strong likelihood" standard states a different, and higher, requirement for establishing a prima facie case than *Batson* permits.

Second, we have observed that comparing, for the first time on appeal, the answers of excused jurors with those of jurors not excused to determine whether the trial court erred in denying an objection to the use of peremptory challenges is unreliable and fails to give due deference to the trial court's ruling. (E.g., *People v. Box* (2000) 23 Cal.4th 1153, 1190 [99 Cal.Rptr.2d 69, 5 P.3d 130]; *People v. Montiel* (1993) 5 Cal.4th 877, 909 [21 Cal.Rptr.2d 705, 855 P.2d 1277]; *People v. Johnson* (1989) 47 Cal.3d 1194, 1220-1222 [255 Cal.Rptr. 569, 767 P.2d 1047].) Defendant contends that this rule against "comparative juror analysis" violates *Batson*.

We conclude that *Wheeler's* terms, a "strong likelihood" and a "reasonable inference," refer to the same test, and this test is consistent with *Batson*. Under both *Wheeler* and *Batson,* to state a prima facie case, the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias. We also conclude that *Batson* does not require state reviewing courts to engage in comparative juror analysis for the first time on appeal. Finally, applying California's procedures, which satisfy *Batson,* to this case, we uphold the trial court's finding that defendant failed to establish a prima facie case that the prosecutor used his peremptory challenges improperly.

Accordingly, we reverse the judgment of the Court of Appeal, which reached contrary conclusions.

I. Facts and Procedural History

A jury found defendant guilty of the second degree murder of the 19-month-old daughter of his girlfriend and of assault resulting in the death of a child under the age of eight. (Pen. Code, §§ 187, 273ab.) The issues before us solely involve jury selection, so we focus on that process.

The district attorney exercised 12 peremptory challenges. He used three of them to challenge all three African-American prospective jurors on the jury panel – C.T., S.E., and R.L. After the second of these challenges, defendant made a "*Wheeler* motion." (*Wheeler, supra,* 22 Cal.3d 258.) He stated that his motion, "[m]ore specifically . . . concerns [S.E.], the last individual who was eliminated by the People." He argued the prosecutor had no apparent reason to challenge this prospective juror "other than [her]

racial identity." He made no argument regarding C.T. The court responded that, "based on the record that's been made, [it] would find that there's not been shown a strong likelihood that the exercise of the peremptory challenges were based upon a group rather than an individual basis. The Court has to start from the position of a premise that the exercises of the peremptory challenges were based on constitutional grounds." The court also told the district attorney, however, that "we are very close."

After the third of these challenges, defendant renewed his *Wheeler* motion. Focusing this time on the most recent challenge, he based his motion on the circumstance that the district attorney had removed all of the African-American prospective jurors. The court denied the motion in a detailed ruling. Regarding the most recent challenge, the court stated that it had had "concerns with regard to her qualifications in this matter based upon her answers on the questionnaire; specifically, the Court had noted that she had a sister who had had drug charges, although her answers in follow-up verbally were such that the Court would not have found that the issues were such to lead to a challenge for cause. May be sufficient to justify a peremptory challenge by the People. [¶] Also, with regard to her answers generally on the questionnaire itself, there was an indication that she had difficulty understanding some of the issues, and specifically, her last response which was somewhat rambling on the questionnaire indicated that she herself felt that she had difficulty understanding things. Again, her verbal responses here in court were such that I would not have granted a challenge for cause on that basis, but the Court felt that the answers on the questionnaire were sufficient that they certainly would have justified a peremptory challenge by either

side, frankly, based upon the concerns about her ability to understand the proceedings."

The court noted the rest of the district attorney's challenges were against "all other types of groups, including white women and white men as well." Regarding S.E., the court stated that it had been concerned about her, "including the answer on question thirty that she gave verbally here in court that she had not included in her questionnaire; a parent had a robbery or arrest, even though that was a number of years ago, thirty years ago. Her answers on the record were not as such that I would have granted a challenge for cause. Certainly, they could justify a challenge by the People. [¶] She expressed on the record that she didn't know if she could be fair. Her verbal follow-up responses were not such that I would have granted a challenge for cause. And also based upon the answers with regard to question sixty-three . . . her emotions and feelings, again, her answers were such that they may have caused concern for either side. Even though the answers tend to lean in the favor of the prosecution in the case, neither side would want a juror deciding a case based upon emotions, rather than the facts and the evidence." "In summary," the court said, "with regard to the jurors, while the Court would not grant the challenges for cause, there were answers . . . at least on the questionnaires themselves such that the Court felt that there was sufficient basis for the peremptory challenge. [¶] Even with the addition of [the most recent challenge], the Court will not find a prima facie case."

The Court of Appeal reversed the judgment. It found that the "strong likelihood" standard the trial court applied violated *Batson, supra,* 476 U.S. 79. Based primarily on its own comparison of answers the challenged jurors

gave with answers of nonchallenged jurors, the court concluded that "a prima facie case of group bias was established and that the judgment must therefore be reversed." Justice Haerle dissented on all points.

We granted the Attorney General's petition for review.

II. Discussion

A. *Background*

Exercising peremptory challenges because of group bias rather than for reasons specific to the challenged prospective juror violates both the California Constitution and the United States Constitution. (*Batson, supra,* 476 U.S. 79; *Wheeler, supra,* 22 Cal.3d 258.) Because *Wheeler* predated *Batson,* the *Wheeler* court obviously did not have the benefit of *Batson* in establishing the procedures to follow in California. Defendant argues that California's procedures violate *Batson* in two respects: (1) *Wheeler's* "strong likelihood" standard, or at least the way it was understood and applied in later cases, is a higher standard than *Batson* permits; and (2) California law impermissibly restricts comparative juror analysis. We discuss these contentions in order below, then review the trial court's rulings. But first, to fully understand these issues, it is necessary to review *Wheeler* and *Batson* in detail.

1. *Wheeler*

In *Wheeler,* we concluded "that the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates" the California Constitution. (*Wheeler, supra,* 22 Cal.3d at p. 276.) We then turned to the difficult question of what to do when one party objects

to the other party's peremptory challenges on this basis. We began "with the proposition that in any given instance the presumption must be that a party exercising a peremptory challenge is doing so on a constitutionally permissible ground. . . . [¶] Yet it is only a presumption, and must be rebuttable if the foregoing constitutional right is not to be nullified even by honest zeal. The issue is what showing is necessary to rebut it. We must define a burden of proof which a party may reasonably be expected to sustain in meritorious cases, but which he cannot abuse to the detriment of the peremptory challenge system." (*Id.* at p. 278.)

We adopted the following procedure: "If a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he must raise the point in timely fashion and make a prima facie case of such discrimination to the satisfaction of the court. First, . . . he should make as complete a record of the circumstances as is feasible. Second, he must establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule. Third, from all the circumstances of the case he must show a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias." (*Wheeler, supra,* 22 Cal.3d at p. 280, fn. omitted.) We discussed types of evidence the objector may present to make this showing. "[T]he party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic – their membership in the group – and that in all other

respects they are as heterogeneous as the community as a whole. Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all. Lastly, . . . the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule; yet if he is, and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court's attention." (*Id.* at pp. 280-281, fn. omitted.)

We then discussed what the court must do. "Upon presentation of this and similar evidence – in the absence, of course, of the jury – the court must determine whether a reasonable inference arises that peremptory challenges are being used on the ground of group bias alone. We recognize that such a ruling 'requires trial judges to make difficult and often close judgments. They are in a good position to make such determinations, however, on the basis of their knowledge of local conditions and of local prosecutors.' [Citation.] They are also well situated to bring to bear on this question their powers of observation, their understanding of trial techniques, and their broad judicial experience. We are confident of their ability to distinguish a true case of group discrimination by peremptory challenges from a spurious claim interposed simply for purposes of harassment or delay.

"If the court finds that a prima facie case has been made, the burden shifts to the other party to show if he can that the peremptory challenges in question were not predicated on group bias alone. The showing need not rise to the level of a challenge for cause. But to sustain his

burden of justification, the allegedly offending party must satisfy the court that he exercised such peremptories on grounds that were reasonably relevant to the particular case on trial or its parties or witnesses – i.e., for reasons of specific bias as defined herein. He, too, may support his showing by reference to the totality of the circumstances: for example, it will be relevant if he can demonstrate that in the course of this same voir dire he also challenged similarly situated members of the majority group on identical or comparable grounds. And again we rely on the good judgment of the trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination.

"If the court finds that the burden of justification is not sustained as to any of the questioned peremptory challenges, the presumption of their validity is rebutted." (*Wheeler, supra,* 22 Cal.3d at pp. 281-282, fn. omitted.)

2. *Batson*

In *Batson,* the United States Supreme Court held that principles of equal protection "forbid discrimination on account of race in selection of the petit jury." (*Batson, supra,* 476 U.S. at p. 88 [106 S.Ct. at p. 1718].) It, too, discussed what to do when one party objects to the other party's peremptory challenges. "As in any equal protection case, the 'burden is, of course,' on the defendant who alleges discriminatory selection of the venire 'to prove the existence of purposeful discrimination.' [Citations.] In deciding if the defendant has carried his burden of persuasion, a court must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as

may be available.' [Citation.] Circumstantial evidence of invidious intent may be proof of disproportionate impact. [Citation.] We have observed that under some circumstances proof of discriminatory impact 'may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on non-racial grounds.' [Citation.] For example, 'total or seriously disproportionate exclusion of Negroes from jury venires,' [citation] 'is itself such an "unequal application of the law . . . as to show intentional discrimination,"' [citations]." (*Id.* at p. 93 [106 S.Ct. at p. 1721].)

A party alleging discriminatory use of peremptories "may make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. [Citation.] Once the defendant makes the requisite showing, the burden shifts to the State to explain adequately the racial exclusion." (*Batson, supra,* 476 U.S. at pp. 93-94 [106 S.Ct. at p. 1721].) In a footnote, the court stated that its "decisions concerning 'disparate treatment' under Title VII of the Civil Rights Act of 1964 have explained the operation of prima facie burden of proof rules. See *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed.2d 668] (1973); *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248 [101 S.Ct. 1089, 67 L.Ed.2d 207] (1981); *United States Postal Service Board of Governors v. Aikens,* 460 U.S. 711 [103 S.Ct. 1478, 75 L.Ed.2d 403] (1983). The party alleging that he has been the victim of intentional discrimination carries the ultimate burden of persuasion. *Texas Dept. of Community Affairs v. Burdine, supra,* at 252-256 [101 S.Ct. at pp. 1093-1095]." (*Id.* at p. 94, fn. 18 [106 S.Ct. at pp. 1721-1722.)

The high court discussed in detail the "standards for assessing a prima facie case in the context of discriminatory selection of the venire. . . . " (*Batson, supra,* 476 U.S. at p. 96 [106 S.Ct. at p. 1723].) "[A] defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group [citation], and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race.[1] Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' [Citation.] Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the

[1] Both *Wheeler, supra,* 22 Cal.3d 258, and *Batson, supra,* 476 U.S. 79, like this case, involve criminal defendants claiming prosecutors impermissibly challenged members of the defendants' own ethnic group. Other cases have expanded the prohibition into other circumstances. (E.g., *J.E.B. v. Alabama ex rel. T.B.* (1994) 511 U.S. 127 [114 S.Ct. 1419, 128 L.Ed.2d 89] [gender]; *Georgia v. McCollum* (1992) 505 U.S. 42 [112 S.Ct. 2348, 120 L.Ed.2d 33] [defendant's exercise of peremptory challenges]; *Edmonson v. Leesville Concrete Co., Inc.* (1991) 500 U.S. 614 [111 S.Ct. 2077, 114 L.Ed.2d 660] [civil cases]; *Powers v. Ohio* (1991) 499 U.S. 400 [111 S.Ct. 1364, 113 L.Ed.2d 411] [defendant need not be member of the excluded group]; *People v. Willis* (2002) 27 Cal.4th 811 [118 Cal.Rptr.2d 301, 43 P.3d 130] [defendant's exercise of peremptory challenges].) We need not consider these cases here.

empanelling of the petit jury . . . raises the necessary inference of purposeful discrimination.

"In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative. We have confidence that trial judges, experienced in supervising *voir dire,* will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors." (*Batson, supra,* 476 U.S. at pp. 96-97 [106 S.Ct. at p. 1723].)

"Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. . . . The prosecutor . . . must articulate a neutral explanation related to the particular case to be tried. The trial court then will have the duty to determine if the defendant has established purposeful discrimination." (*Batson, supra,* 476 U.S. at pp. 97-98 [106 S.Ct. at p. 1723], fns. omitted.) In a footnote, the court also stated, "Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." (*Id.* at p. 98, fn. 21 [106 S.Ct. at p. 1724].)

In rejecting an argument that its holding could create serious administrative difficulties, the high court noted that "[i]n those States applying a version of the evidentiary

standard we recognize today," courts have not experienced these difficulties. (*Batson, supra,* 476 U.S. at p. 99 [106 S.Ct. at p. 1724].) "For example, in *People v. Hall,* 35 Cal.3d 161, 672 P.2d 854 (1983), the California Supreme Court found that there was no evidence to show that procedures implementing its version of this standard, imposed five years earlier, were burdensome for trial judges." (*Id.* at p. 99, fn. 23 [106 S.Ct. at p. 1724].)

B. *The Necessary Showing for a Prima Facie Case*

Wheeler used both the terms "strong likelihood" and "reasonable inference" in describing the standard for a prima facie case. (*Wheeler, supra,* 22 Cal.3d at pp. 280, 281.) We believe it obvious that we considered the two terms to be different phrasing of the same standard. Language in a 1994 Court of Appeal decision, *People v. Bernard* (1994) 27 Cal.App.4th 458 [32 Cal.Rptr.2d 486], however, created some uncertainty. That case seemed to read the two terms as stating different standards, with "reasonable inference" being a lower standard than "strong likelihood." (*Id.* at p. 465.)

In *Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190, the court found that, at least after *People v. Bernard, supra,* 27 Cal.App.4th 458, "California state courts have applied a lower standard of scrutiny to peremptory strikes than the federal Constitution permits." (*Wade v. Terhune, supra,* at pp. 1196-1197.) The court noted also that, in recent years, this court has generally cited the "strong likelihood" language rather than the "reasonable inference" language. (*Id.* at p. 1197.) It believed that California courts give criminal defendants less protection than the United States Constitution requires "when they follow the *Wheeler*

'strong likelihood' test in determining whether a *prima facie* case has been established." (*Wade v. Terhune, supra,* at p. 1197.) In the court's view, "the *Wheeler* 'strong likelihood' test for a successful *prima facie* showing of bias is impermissibly stringent in comparison to the more generous *Batson* 'inference' test." (*Ibid.*) The court "therefore conclude[d] that California courts in following the 'strong likelihood' language of *Wheeler* are not applying the correct legal standard for a *prima facie* case under *Batson.*" (*Ibid.*)

Shortly after *Wade v. Terhune, supra,* 202 F.3d 1190, and in response to it, we reiterated that "in California, a 'strong likelihood' means a 'reasonable inference,'" and disapproved *People v. Bernard, supra,* 27 Cal.App.4th 458, "to the extent it is inconsistent with *People v. Wheeler, supra,* 22 Cal.3d at pages 280-281." (*People v. Box, supra,* 23 Cal.4th at p. 1188, fn. 7.) However, the Ninth Circuit Court of Appeals held that this action did not cure the problem it perceived, at least for cases tried after *Bernard* and before *Box* in which trial courts were "following *Bernard's* take on *Wheeler.*" (*Cooperwood v. Cambra* (9th Cir. 2001) 245 F.3d 1042, 1047.) It said that "regardless" of our action in *People v. Box, supra,* at page 1188, footnote 7, "whenever state courts use the 'strong likelihood' standard, . . . these courts are applying a lower standard of scrutiny to peremptory strikes than the federal Constitution permits." (*Cooperwood v. Cambra, supra,* at p. 1047.) The majority below agreed and, accordingly, found that the trial court used an impermissible standard in determining whether defendant had established a prima facie case.

We reiterate what we implied in *Wheeler* and stated in *Box: Wheeler's* terms "strong likelihood" and "reasonable inference" state the same standard. (*People v. Box, supra,*

23 Cal.4th at p. 1188, fn. 7; *Wheeler, supra,* 22 Cal.3d at pp. 280-281.) This has always been true, although we recognize that *People v. Bernard, supra,* 27 Cal.App.4th 458, may have created some uncertainty for a few years. But the important question for current purposes is not whether California courts have always viewed these terms as the same, but whether California's "strong likelihood" standard violates *Batson.* The *Wade v. Terhune* court and the majority below assumed that *Batson's* inference test is "more generous" than *Wheeler's* strong likelihood test without examining what the United State Supreme Court itself has said on the matter. (*Wade v. Terhune, supra,* 202 F.3d at p. 1197.) But to address this question, it is necessary to delineate exactly what the high court meant when it equated the necessary prima facie case with "an inference of discriminatory purpose." (*Batson, supra,* 476 U.S. at p. 94 [106 S.Ct. at p. 1721].) We believe the court has made its meaning clear.

The high court appears to have given other courts some flexibility in establishing the exact procedures to follow. "We decline, however, to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges." (*Batson, supra,* 476 U.S. at p. 99 [106 S.Ct. at pp. 1724-1725].) Thus, to some extent at least, *Batson* seems to have "left to lower courts the task of determining the type and quantum of proof necessary for a defendant to establish a prima facie case." (*State v. Duncan* (La. 2001) 802 So.2d 533, 545; see also Note, *Batson v. Kentucky and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection?* (1988) 74 Va. L.Rev. 811, 817 ["The Supreme Court has left the lower courts to grapple with the proper implementation of the *Batson* test. They must determine not only the

quantum of proof necessary for a defendant to establish a prima facie case but also the types of explanations sufficient to rebut the defendant's claim"].) But whatever flexibility the high court has left state courts, the California standard is not less generous than the test the *Batson* court itself applies to establish a prima facie case.

In *Batson,* the court stated that its decisions under title VII of the Civil Rights Act of 1964 "explained the operation of prima facie burden of proof rules." (*Batson, supra,* 476 U.S. at p. 94, fn. 18 [106 S.Ct. at pp. 1721-1722].) The court has since repeatedly cited title VII cases as authoritative in the *Batson* context. (*Miller-El v. Cockrell* (2003) 537 U.S. 322, ___ [123 S.Ct. 1029, 1041, 154 L.Ed.2d 931] (*Miller-El*); *Purkett v. Elem* (1995) 514 U.S. 765, 768 [115 S.Ct. 1769, 1771, 131 L.Ed.2d 834]; *Hernandez v. New York* (1991) 500 U.S. 352, 359 [111 S.Ct. 1859, 1866, 114 L.Ed.2d 395] (plur. opn.).) One of the decisions the court cited in *Batson, McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed.2d 668], made clear that the plaintiff carried the initial burden of showing actions "from which one can infer, if such actions remain unexplained, that it is *more likely than not* that such actions were 'based on a discriminatory criterion illegal under the Act.'" (*Furnco Construction Corp. v. Waters* (1978) 438 U.S. 567, 576 [98 S.Ct. 2943, 2949, 57 L.Ed.2d 957], italics added.) Another of the decisions that *Batson* cited explained that the burden is not "onerous," but the party nevertheless had to prove "by the *preponderance of the evidence* a prima facie case of discrimination." (*Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248, 252-253 [101 S.Ct. 1089, 1093], italics added.) It stated that "the prima facie case 'raises an *inference* of discrimination only because we

presume these acts, if otherwise unexplained, are *more likely than not* based on the consideration of impermissible factors.'" (*Id.* at p. 254 [101 S.Ct. at p. 1094], italics added.)

In one of the cases *Batson* cited, the high court recognized that the term "prima facie case" is, by itself, ambiguous, so it specifically stated what it meant in this context. "The phrase 'prima facie case' not only may denote the establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue. 9 J. Wigmore, Evidence § 2494 (3d ed. 1940). *McDonnell Douglas* should have made it apparent that in the Title VII context we use 'prima facie case' in the former sense." (*Texas Dept. of Community Affairs v. Burdine, supra,* 450 U.S. at p. 254, fn. 7 [101 S.Ct. at p. 1094].) Thus, when it refers to the objector establishing "an inference of discriminatory purpose" (*Batson, supra,* 476 U.S. at p. 94 [106 S.Ct. at p. 1721]), the high court means establishing a legally mandatory rebuttable presumption, and *not* merely presenting enough evidence to *permit the inference.*

Wigmore, in turn, goes into greater detail. He explains that the term "'prima facie case' is used in two senses. . . . " (9 Wigmore, Evidence (Chadbourne rev. ed. 1981) § 2494, p. 378.)[2] The sense the high court does *not* mean in this context created the lower of the two burdens – merely the

[2] We are quoting the most recent revision of this work rather than the earlier version the high court cited in *Texas Dept. of Community Affairs v. Burdine, supra,* 450 U.S. 248; the two versions are identical as relevant.

"duty of producing *some evidence*" sufficient to allow a matter to go to the jury. (Wigmore, at p. 379, italics added.) Wigmore also describes the sense in which the high court uses the term. "[T]he term 'prima facie' is sometimes used as *equivalent to the notion of a presumption,* even in the strict sense of a ruling of the judge putting upon the opponent the duty of producing evidence." (*Ibid.*) Thus, it applies "where the proponent, having the burden of proving the issue (i.e., the risk of nonpersuasion of the jury), has not only removed by sufficient evidence the duty of producing evidence to get past the judge or the jury, but has gone further, and, either by means of a presumption or by a general mass of *strong evidence,* has entitled himself to a ruling that the opponent should fail if he does nothing more in the way of producing evidence." (*Ibid.,* italics added.)

Thus, *Batson* permits a court to require the objector to present, not merely "some evidence" permitting the inference, but "strong evidence" that makes discriminatory intent more likely than not if the challenges are not explained. Nothing suggests the high court has since modified *Batson's* approach. Indeed, in its most recent decision on this subject, it said it was considering "the three-step framework mandated by *Batson* and reaffirmed in our later precedents" and, in describing the prima facie case requirement, echoed *Batson's* "inference" language. (*Miller-El, supra,* 537 U.S. at pp. ___, ___ [123 S.Ct. at pp. 1040, 1045] ["the inference of discrimination to support a prima facie case"].)

Other states, although not all,[3] have reached similar conclusions regarding *Batson's* meaning. Citing *Texas Dept. of Community Affairs v. Burdine, supra,* 450 U.S. at pages 252-253 [101 S.Ct. 1093], the Connecticut Supreme Court has said that under the first stage of the *Batson* inquiry, the "defendant must establish by a preponderance of the evidence a prima facie case of purposeful discrimination." (*State v. Gonzalez* (1988) 206 Conn. 391 [538 A.2d 210, 213].) The Maryland Court of Appeals recognized that *Batson* cited title VII cases "for an explanation of the operation of prima facie burden of proof rules." (*Stanley v. State* (1988) 313 Md. 50 [542 A.2d 1267, 1271].) The Maryland Court of Appeals also concluded that "to make the *prima facie* showing *Batson* requires, the moving party must 'prove by a preponderance of the evidence that the peremptory challenges were exercised in a way that shifts the burden of production to the State and requires it to respond to the rebuttable presumption of purposeful discrimination that arises under certain circumstances.'" (*Mejia v. State* (1992) 328 Md. 522 [616 A.2d 356, 361], quoting *Stanley v. State, supra,* at p. 1277.)

Wheeler's term "strong likelihood" signals that it meant "prima facie case" in a similar sense.[4] This burden

[3] The Colorado Supreme Court, for example, has interpreted *Batson* as not requiring the defendant "to prove by a preponderance of the evidence that discrimination occurred. Rather, the defendant must present evidence sufficient to raise an inference that discrimination occurred." (*Valdez v. People* (Colo. 1998) 966 P.2d 587, 590.) But the court did not examine what the high court itself has stated on the question.

[4] The dissent claims Evidence Code section 600, subdivision (b), which defines an inference as "a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or

(Continued on following page)

is not onerous (*Texas Dept. of Community Affairs v. Burdine, supra,* 450 U.S. at p. 253 [101 S.Ct. at pp. 1093-1094]), but it is substantial. It is also appropriate to compel the objecting party to meet this burden before it can force the other party to explain the reasons for its peremptory challenges. The burden is one "which a party may reasonably be expected to sustain in meritorious cases, but which he cannot abuse to the detriment of the peremptory challenge system." (*Wheeler, supra,* 22 Cal.3d at p. 278.) The high court itself has noted that the *Batson* analysis "permits prompt rulings on objections to peremptory challenges without substantial disruption of the jury selection process." (*Hernandez v. New York, supra,* 500 U.S. at p. 358 [111 S.Ct. at pp. 1865-1866] (plur. opn.); see also *id.* at p. 374 [111 S.Ct. at p. 1874] (conc. opn. of O'Connor, J.) [warning against "unacceptable delays in the trial process" that would be "antithetical to the nature and purpose of the peremptory challenge"].)

The term "strong likelihood" has never set a higher standard than *Batson* permits. *Wheeler* "define[d] a burden of proof. . . . " (*Wheeler, supra,* 22 Cal.3d at p. 278.) "Except as otherwise provided by law," the default burden of proof in California is "proof by a preponderance of the

otherwise established in the action," somehow supports its position. (Dis. opn., *post,* at p. 1334.) The *Wheeler* court certainly understood that an inference is a logical deduction of fact. But the question here, which Evidence Code section 600 does not address, is how strong the inference must be. In a criminal trial, for example, an inference of guilt must be beyond a reasonable doubt. The dissent's own unique proposed test – "a substantial danger that the prosecutor's challenges were based on improper grounds" – is not found in Evidence Code section 600. (Dis. opn., *post,* at p. 1334.)

evidence." (Evid. Code, § 115; see *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 546 [110 Cal.Rptr.2d 412, 28 P.3d 151].) Here, no other law has provided for a different standard. This court has never suggested that *Wheeler* imposed the burden of either clear and convincing proof or proof beyond a reasonable doubt, the two higher burdens of proof that exist in this state. (Evid. Code, § 115.) Moreover, the unqualified word "likelihood" would have been insufficient to signal the correct standard. That word, or the equivalent "likely," has a range of meanings, including some lower than more likely than not. (See *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 917, 922 [119 Cal.Rptr.2d 1, 44 P.3d 949] [interpreting a statute using the word "likely" as not requiring a showing of a "better than even" chance].) Thus, qualifying "likelihood" with "strong" is appropriate and consistent with *Batson*.

Although not dispositive, the *Batson* court itself considered *Wheeler's* procedures comparable to its own. It did not specifically cite *Wheeler's* "strong likelihood" language, but it referred to this court's "procedures implementing its version of [*Batson's* evidentiary] standard" without suggesting there was anything wrong with those procedures. (*Batson, supra,* 476 U.S. at p. 99, fn. 23 [106 S.Ct. at p. 1724].)

We disagree that the "strong likelihood" standard became too high in the interval between *People v. Bernard, supra,* 27 Cal.App.4th 458, and *People v. Box, supra,* 23 Cal.4th 1153. *Bernard* did not somehow transform "strong likelihood" from a correct to an incorrect standard. Like the court in *Wade v. Terhune, supra,* 202 F.3d 1190, and the majority below, the *Bernard* court did not examine what *Wheeler* or the high court meant by the word "inference" in this context. It misunderstood that meaning. The

Bernard court said the presumption that peremptory challenges are being used properly should be rebuttable "only by a strong showing, not a mere inference," because a different standard "might easily transform removal of each and every prospective juror belonging to a cognizable group into a *Wheeler* hearing." (*People v. Bernard, supra,* at p. 465.) It also referred to "a reduction of the prima facie standard to a 'reasonable inference' test." (*Ibid.*) This use of the word "inference" was akin to Wigmore's lower sense of evidence merely permitting one to draw an inference, not the higher sense of *Batson* and *Wheeler.* Thus, to the extent *Bernard* erred, it was in assuming "inference" was lower than it really is in this context, not in raising "strong likelihood" to an impermissibly high standard.

Accordingly, *Wheeler's* standard for establishing a prima facie case of discriminatory use of peremptory challenges is, and always has been, compatible with *Batson.* It merely means that to state a prima facie case, the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias. The trial court here properly cited the *Wheeler* standard in determining whether defendant had established a prima facie case.

C. *Appellate Use of Comparative Juror Analysis*

The majority below compared the answers of challenged jurors with those of nonchallenged jurors, a comparison not done at trial, in order to overturn the trial court's finding of no prima facie case. Defendant argues that doing so was proper and that our cases, which he interprets as prohibiting all comparative juror analysis,

violate *Batson, supra,* 476 U.S. 79. Defendant misunderstands our jurisprudence. We have observed that engaging in comparative juror analysis *for the first time on appeal* is unreliable and inconsistent with the deference reviewing courts necessarily give to trial courts, but we have never prohibited trial courts from doing so or the party objecting to the challenges from relying on such analysis in seeking to make a prima facie case.

In *People v. Johnson, supra,* 47 Cal.3d 1194, we revisited *People v. Trevino* (1985) 39 Cal.3d 667 [217 Cal.Rptr. 652, 704 P.2d 719], which had engaged in comparative juror analysis for the first time on appeal. We found that *Trevino* had "placed undue emphasis on comparisons of the stated reasons for the challenged excusals with similar characteristics of nonmembers of the group who were not challenged by the prosecutor. First, we note . . . that the comparison is one-sided since it ignores the characteristics of the other . . . jurors against whom the prosecutor also exercised peremptory challenges. [Citation.] Moreover, we fail to see how a trial judge can reasonably be expected to make such detailed comparisons mid-trial." (*People v. Johnson, supra,* at p. 1220.)

We explained that "use of a comparison analysis to evaluate the bona fides of the prosecutor's stated reasons for peremptory challenges does not properly take into account the variety of factors and considerations that go into a lawyer's decision to select certain jurors while challenging others that appear to be similar. Trial lawyers recognize that it is a combination of factors rather than any single one which often leads to the exercise of a peremptory challenge. In addition, the particular combination or mix of jurors which a lawyer seeks may, and often does, change as certain jurors are removed or seated in the

jury box." (*People v. Johnson, supra,* 47 Cal.3d at p. 1220.)[5] We found it apparent "that the very dynamics of the jury selection process make it difficult, if not impossible, on a cold record, to evaluate or compare the peremptory challenge of one juror with the retention of another juror which on paper appears to be substantially similar. [Attempting] to make such an analysis of the prosecutor's use of his peremptory challenges is highly speculative and less reliable than the determination made by the trial judge who witnessed the process by which the defendant's jury was selected. It is therefore with good reason that we and the United States Supreme Court give great deference to the trial court's determination that the use of peremptory challenges was not for an improper or class bias purpose." (*Id.* at p. 1221.)

Accordingly, we disapproved *People v. Trevino, supra,* 39 Cal.3d 667, to the extent it was inconsistent with these views and returned to a "standard of truly giving great deference to the trial court in distinguishing bona fide reasons from sham excuses." (*People v. Johnson, supra,* 47 Cal.3d at p. 1221.) Like the high court, we stated we "'may assume that trial judges, in supervising *voir dire* in light of our decision today, will be alert to identify a prima facie case of purposeful discrimination.'" (*Ibid.,* quoting *Batson, supra,* 476 U.S. at p. 99, fn. 22 [106 S.Ct. at p. 1724].)

Since then, we have not engaged in comparative juror analysis for the first time on appeal. "If the trial court

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[5] This case presents an example. The district attorney accepted the jury four times with C.T. on it before he peremptorily challenged her, apparently due to a change in the jury's composition.

makes a 'sincere and reasoned effort' to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. In such circumstances, an appellate court will not reassess good faith by conducting its own comparative juror analysis. Such an approach would undermine the trial court's credibility determinations and would discount '"the variety of [subjective] factors and considerations,"' including 'prospective jurors' body language or manner of answering questions,' which legitimately inform a trial lawyer's decision to exercise peremptory challenges." (*People v. Montiel, supra,* 5 Cal.4th at p. 909.)

Defendant argues that *any* rule against comparative juror analysis is invalid but, as a backup position, he also argues that, at least, the rule is limited to the *second* stage of the trial court's duty – judging the validity of the reasons for the exercising of challenges after it has found a prima facie case – and does not apply to the *first* stage – judging whether the objector has established a prima facie case to begin with. We disagree. Although some of our decisions, including *People v. Johnson, supra,* 47 Cal.3d 1194, did involve the second stage, others reviewed trial court findings of no prima facie case. (E.g., *People v. Box, supra,* 23 Cal.4th at pp. 1188, 1190; *People v. Turner* (1994) 8 Cal.4th 137, 167, 169-170 [32 Cal.Rptr.2d 762, 878 P.2d 521].) Differences do exist in the two procedural postures. At the first stage, the party making the challenges is not asked to explain them, so the trial court does not have to judge that party's credibility. But the concerns about the inability of a reviewing court to judge the dynamics of jury selection *on a cold record* apply to both stages. A comparison of the jurors' answers is unreliable when divorced from the context of the trial. A trial court, but not a reviewing

court, is able to place the answers into context and draw meaning from *all* the circumstances, including matters not discernable from the record.

Even the Ninth Circuit Court of Appeals, which has a different practice in this regard than we (*Burks v. Borg* (9th Cir. 1994) 27 F.3d 1424, 1427), reviews a trial court's finding of no prima facie case deferentially. (*Tolbert v. Page* (9th Cir. 1999) 182 F.3d 677 (in bank).) Its reasoning for giving such deference echoes ours both in giving similar deference and in not engaging in comparative juror analysis for the first time on appeal. "[T]he trial court is better positioned to decide the *Batson* prima facie issue, which involves a '"factual inquiry" that "takes into account all the possible explanatory factors" in the particular case.' [Citation.] Whether or not 'all the relevant circumstances' 'raise an inference' of discrimination will depend on factors such as the attitude and behavior of the challenging attorney and the prospective jurors manifested during voir dire. As a purely practical matter, the trial judge's unique perspective of voir dire enables the judge to have first-hand knowledge and observation of critical events. [Citation.] The trial judge personally witnesses the totality of circumstances that comprises the 'factual inquiry,' including the jurors' demeanor and tone of voice as they answer questions and counsel's demeanor and tone of voice in posing the questions. [Citation.] The trial judge is able to observe a juror's attention span, alertness, and interest in the proceedings and thus will have a sense of whether the prosecutor's challenge can be readily explained by a legitimate reason. . . . In addition, the trial court is 'experienced in supervising voir dire.' [Citations.]

"The appellate court, on the other hand, must judge the existence of a prima facie case from a cold record. An

appellate court can read a transcript of the voir dire, but it is not privy to the unspoken atmosphere of the trial court – the nuance, demeanor, body language, expression and gestures of the various players. [Citation.] . . . [T]he prima facie inquiry is so fact-intensive and so dependent on first-hand observations made in open court that the trial court is better positioned to decide the issue. . . ." (*Tolbert v. Page, supra,* 182 F.3d at pp. 683-684.)

"While [*People v. Johnson, supra,* 47 Cal.3d 1194] limits the scope of appellate review of a trial court's *Batson* determination, it does not preclude comparative analysis by the trial court." (*Burks v. Borg, supra,* 27 F.3d at p. 1428.) We do not, and cannot reasonably, require trial judges to perform such analysis *itself* (*People v. Johnson, supra,* 47 Cal.3d at p. 1220), but the objecting party may make the argument for the trial court to evaluate. For example, in *People v. Crittenden* (1994) 9 Cal.4th 83 [36 Cal.Rptr.2d 474, 885 P.2d 887], the defendant presented at trial "evidence, compiled from the biographical information of 50 prospective jurors," and compared those jurors' answers in support of his argument that the prosecutor improperly challenged a particular juror. (*Id.* at p. 116.) As the reviewing court, we considered this and other evidence and concluded that "[i]n light of all the relevant circumstances, the trial court properly could find that defendant had not made a prima facie showing. . . . " (*Id.* at p. 119.)

In support of his position, defendant cites *Miller-El, supra,* 537 U.S. 322 [123 S.Ct. 1029], but that case merely provides another example of a reviewing court considering evidence of comparative juror analysis after it had been presented to the trial court. *Miller-El* was tried before the decision in *Batson, supra,* 476 U.S. 79. At trial, the defendant had objected that the prosecution was using peremptory

challenges discriminatorily, but the *Batson* procedures had not yet been established. *Batson* was decided while the case was on appeal. The Texas Court of Criminal Appeals remanded the case to the original trial court for new findings in light of *Batson.* Defendant presented to the trial court several types of evidence supporting a prima facie case. Before the original trial, he had presented "evidence relating to a pattern and practice of race discrimination in the *voir dire.*" (*Miller-El, supra,* 537 U.S. at p. ___ [123 S.Ct. at p. 1036].) Then, two years later, "he presented, to the same state [trial] court, evidence that directly related to the conduct of the prosecutors in his case." (*Ibid.*) Some of the latter evidence was comparative juror analysis of the type offered for the first time on appeal here. (*Id.* at p. ___ [123 S.Ct. at p. 1043].) After the state courts denied relief, the federal district court denied relief on federal habeas corpus, and the appellate court denied a certificate of appealability which, under federal law, prevented the defendant from appealing the matter. The United States Supreme Court reversed the denial of a certificate of appealability. It did not directly address the *Batson* question, but rather determined that the issue was "debatable" and, under federal habeas corpus law, the appellate court should have considered it on the merits. (*Id.* at p. ___ [123 S.Ct. at p. 1045].) Its discussion made clear that the comparative juror analysis presented to the trial court was among the evidence reviewing courts should consider. (*Id.* at p. ___ [123 S.Ct. at p. 1043].) This conclusion is consistent with our practice. Nothing in *Miller-El,* however, suggests that a reviewing court must engage in comparative juror analysis *for the first time on appeal.*

Both *Wheeler* and *Batson* place the burden of making the prima facie showing on the objecting party. (*Batson, supra,* 476 U.S. at p. 96 ["the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race"]; *Wheeler, supra,* 22 Cal.3d at p. 280 [the objecting party must "make a prima facie case of . . . discrimination to the satisfaction of the court," should "make as complete a record of the circumstances as is feasible," and "from all the circumstances of the case . . . must show a strong likelihood" of improper challenges].) Neither decision requires a reviewing court to search the record itself for evidence that might have supplemented the objector's showing. Nor must the trial court consider arguments not made and evidence not presented, although nothing prevents it from doing so in judging all of the circumstances.

Defendant argues that our statement that we cannot expect a trial judge "to make such detailed comparisons mid-trial" (*People v. Johnson, supra,* 47 Cal.3d at p. 1220) "overlooks the trial lawyers' role." He argues that the attorneys can make these arguments to assist the trial court "because, under the adversary system, the job of marshaling the relevant evidence is performed in the first instance by the lawyers. Accordingly, comparative juror analysis can easily and realistically be employed by state trial judges, too." We agree. Indeed, as noted, *People v. Crittenden, supra,* 9 Cal.4th 83, provides an example of the attorneys doing just this for the trial court's consideration. But defendant did not make this kind of showing at trial, and we cannot expect the trial court to do so itself.

We have also said that comparative juror analysis is "largely beside the point" because of the legitimate subjective concerns that go into selecting a jury. (*People v. Arias* (1996) 13 Cal.4th 92, 136, fn. 16 [51 Cal.Rptr.2d 770, 913 P.2d 980].) But it is not *irrelevant.* Although such analysis, by itself, proves little, properly presented to the trial court, it can be among the "all relevant circumstances" (*Batson, supra,* 476 U.S. at pp. 96-97 [106 S.Ct. 1723]) or "all the circumstances of the case" (*Wheeler, supra,* 22 Cal.3d at p. 280) that the trial court must consider in making its determination.

In *People v. Howard* (1992) 1 Cal.4th 1132 [5 Cal.Rptr.2d 268, 824 P.2d 1315], we did not "limit[] our review . . . solely to counsel's presentation at the time of the motion. This is because other circumstances might support the finding of a prima facie case even though a defendant's showing [was itself inadequate]. Nor should the trial court blind itself to everything except defense counsel's presentation. Indeed, we have emphasized that such rulings require trial judges to consider 'all the circumstances of the case' [citation] and call upon judges' '"powers of observation, their understanding of trial techniques, and their broad judicial experience."' [Citations.] The trial judge in this case, for example, obviously knew that defendant belonged to the same group as the challenged jurors and that his victims did not. Clearly these are relevant factors [citation], and they were apparent to the trial court even though defendant did not mention them during his *Wheeler* motion." (*Id.* at p. 1155.) "For these reasons," we said, "when a trial court denies a *Wheeler* motion without finding a prima facie case of group bias the reviewing court considers the entire record of voir dire." (*Ibid.*) Certainly, the trial court should consider

obvious matters, and it can consider any other circumstances it finds relevant in the particular case. But, midtrial, we cannot expect, and do not demand, trial courts to engage sua sponte in the sort of comparative juror analysis that appellate lawyers and courts can do after scouring the often lengthy appellate record during the appeal. And, given the inability of reviewing courts to reliably conduct such analysis on a cold record, those courts are not required to do so for the first time on appeal.

Defendant cites a number of federal cases that engage in comparative juror analysis in a different way than we do. The Ninth Circuit, for example, has stated that its practice is different than ours. (*Burks v. Borg, supra,* 27 F.3d at p. 1427.)[6] Other courts may certainly adopt different procedures than we. But we do not believe that comparative juror analysis for the first time on appeal is constitutionally compelled. The *Batson* court itself stated that in deciding whether the defendant has made the necessary showing, "the *trial court* should consider all relevant circumstances." (*Batson, supra,* 476 U.S. at pp. 96-97 [106 S.Ct. at p. 1723], italics added.) It relies heavily on "trial judges, experienced in supervising *voir dire,*" to make this determination. (*Id.* at p. 97 [106 S.Ct. at p. 1723].) "During jury selection, the entire *res gestae* take place in front of the trial judge. Because the judge has before him the entire venire, he is well situated to detect

[6] That court also noted that the United States Supreme Court "has not yet ruled on the role of comparative analysis on appellate review, so no one is quite sure whether our circuit or the California Supreme Court is right." (*Burks v. Borg, supra,* 27 F.3d at p. 1427.)

whether a challenge to the seating of one juror is part of a 'pattern' of singling out members of a single race for peremptory challenges." (*United States v. Armstrong* (1996) 517 U.S. 456, 467-468 [116 S.Ct. 1480, 1488, 134 L.Ed.2d 687].) The "entire *res gestae*" do not take place in front of an appellate court.

The *Batson* court rejected the argument that its holding would "create serious administrative difficulties" and noted that California had not found its own version to be "burdensome for trial judges." (*Batson, supra,* 476 U.S. at p. 99 & fn. 23 [106 S.Ct. at p. 1724], citing *People v. Hall* (1983) 35 Cal.3d 161 [197 Cal.Rptr. 71, 672 P.2d 854].) However, requiring trial courts to engage in comparative juror analysis sua sponte in the middle of the trial *would* be burdensome. Moreover, permitting appellate courts to overturn trial court decisions based on their own comparative analysis of a cold record, divorced from the nuances of trial not apparent from the record, is inconsistent with the deference reviewing courts necessarily give trial courts. We see nothing in the high court decisions requiring us to defer less to trial courts or engage in our own comparative juror analysis for the first time on appeal.[7]

[7] The dissent claims that our reliance on *People v. Johnson, supra,* 47 Cal.3d 1194, is misplaced because *Johnson* barred using comparative juror analysis on appeal *whether or not the parties raised that approach in the trial court.* (Dis. opn., *post,* at pp. 1330-1332.) Contrary to the dissent, *Johnson's* underlying rationale was predicated on the fact that the defendant made no comparative juror argument *at trial.* We reasoned that: (1) a trial judge could not reasonably be expected to make detailed comparisons of jurors midtrial *sua sponte,* and (2) *without explanation at trial* from the party who exercised the challenge,

(Continued on following page)

Accordingly, we maintain our long-standing practice. When the objecting party presents comparative juror analysis to the trial court, the reviewing court must consider that evidence, along with everything else of relevance, in reviewing, deferentially, the trial court's ruling. When such an analysis was not presented at trial, a reviewing court should not attempt its own comparative juror analysis for the first time on appeal, especially when, as here, the record supports the trial court's finding of no prima facie case. While we decline to prohibit the practice outright, we are hard pressed to envision a scenario where

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comparative juror analysis could not accurately take into account the various factors that influence the decision to make a peremptory challenge. (*Johnson, supra,* at pp. 1220-1221.) We then concluded, "It should be apparent, *therefore,* that the very dynamics of the jury selection process make it difficult, if not impossible, *on a cold record,* to evaluate or compare the peremptory challenge of one juror with the retention of another juror which *on paper* appears to be substantially similar." (*Id.* at p. 1221, italics added.) In other words, the trial and appellate courts are in no position to engage in comparative juror analysis on their own, without the issue first being raised by the parties at trial. Our approach is entirely consistent with *Johnson.*

Contrary to the dissent, *People v. Johnson, supra,* 47 Cal.3d 1194, is also entirely consistent with *Miller-El.* In that case, the high court had "no difficulty in using comparative juror analysis" (dis. opn., *post,* at p. 1332) because it was simply reviewing the state court record, i.e., comparative juror evidence that the defendant had first presented to the trial judge in support of his *Batson* motion. (*Miller-El, supra,* 537 U.S. at pp. ___, ___ [123 S.Ct. at pp. 1035-1036, 1043-1045].) Evidently, none of the parties disputed that a comparative juror analysis is a proper or necessary procedure in deciding a *Batson* claim. Thus, that issue was not before the high court, which only addressed whether the underlying evidence before the state trial court supported the issuance of a certificate of appealability. (*Id.* at pp. ___-___ [123 S.Ct. at pp. 1042-1045].)

comparative juror analysis for the first time on appeal would be fruitful or appropriate.

D. *The Trial Court's Ruling in this Case*

We have already alluded to the standard of appellate review of a trial court's finding of no prima facie case. Because these rulings call upon trial judges' personal observations, we review them with considerable deference. (*People v. Jones* (1998) 17 Cal.4th 279, 294 [70 Cal.Rptr.2d 793, 949 P.2d 890].) Of course, "deference is not abdication. . . . " (*People v. Scott* (1997) 15 Cal.4th 1188, 1212 [65 Cal.Rptr.2d 240, 939 P.2d 354]; see also *Miller-El, supra,* 537 U.S. at p. ___ [123 S.Ct. at p. 1041] ["deference does not imply abandonment or abdication of judicial review"].) Accordingly, we review the entire record for evidence supporting the trial court's ruling. But if the record suggests grounds on which the prosecutor might reasonably have challenged the jurors, we affirm that ruling. (*People v. Howard, supra,* 1 Cal.4th at p. 1155.)

The record here suggests grounds for the prosecutor to have reasonably challenged these jurors. The trial judge, "who had performed much of and observed the remainder of the voir dire, [and thus] was in the best position to determine under 'all the relevant circumstances' of the case" whether a prima facie showing existed (*People v. Box, supra,* 23 Cal.4th at p. 1189), mentioned reasons as to two of the jurors. The court noted that these reasons did not warrant a challenge for cause, but peremptory challenges need not be based on grounds for a challenge for cause. (*People v. Jones, supra,* 17 Cal.4th at p. 294.) So far as we can review the court's reasons on the cold record, the record supports them. Defendant has a different view of

the significance of these jurors' answers and courtroom statements, but we see no basis on which to overturn the trial court's determinations.

As the majority below and defendant point out, the trial court did not specifically discuss the third of the challenged jurors, C.T., who was actually the first one challenged. But at trial, defendant did not argue that no reason existed to challenge that juror. His first *Wheeler* motion was "specifically" directed towards the challenge of S.E. His second *Wheeler* motion also never referred to C.T. The court acted reasonably in discussing the arguments defendant made, not arguments he did not make. Moreover, as the dissent below noted, the record discloses race-neutral grounds for challenging C.T.: "(1) she was childless (this case involved the death and alleged abuse of a minor), (2) the police had made no arrest after the robbery of her home five or six years ago, and (3) she omitted to answer the two questions in the questionnaire dealing with her opinions of prosecuting and defending attorneys." (Fn. omitted.) As that dissent also noted, "lack of family may have appeared relevant to the prosecutor in a case involving child abuse and reasonably could be deemed to constitute a non-discriminatory basis for striking the venireman." (*U.S. v. Lewis* (9th Cir. 1988) 837 F.2d 415, 417.)

Defendant stresses that the district attorney used three of his 12 peremptory challenges to remove all three African-American prospective jurors, and this case involves an African-American defendant charged with killing "his White girlfriend's child." These circumstances are obviously highly relevant to whether a prima facie case existed. (*Wheeler, supra,* 22 Cal.3d at pp. 280-281.) They definitely warranted the trial court's careful scrutiny,

which that court gave. The court considered the question close but found no prima facie case under all the circumstances. We will not second-guess its determination by attempting a comparative juror analysis for the first time on appeal.

An additional note about the circumstances of this case is in order. Viewing these circumstances in isolation, it certainly looks suspicious that all three African-American prospective jurors were removed from the jury. But viewing a case like this in isolation is all a reviewing court *can* do. When this issue comes before a reviewing court, the circumstances often will be akin to those here. A reviewing court does not review the ordinary, nonsuspicious cases of jury selection. (Nor does it review those cases in which the trial court *grants* a *Wheeler* motion, so it also never sees those rulings.) A reviewing court does not see the big picture; it cannot place a case like this into perspective. It cannot know whether a case like this is typical, thus suggesting a real problem, or merely a statistical aberration of the type that will inevitably occur occasionally given such a small sampling. The trial court, however, is capable of seeing the big picture. It can place a specific trial in a county into perspective. Trial judges "'are in a good position to make such determinations . . . on the basis of their knowledge of local conditions and of local prosecutors.'" (*Wheeler, supra,* 22 Cal.3d at p. 281.) This is another reason we must, and can, rely on trial courts to determine, from all the relevant circumstances, whether a prima facie case of discriminatory use of peremptory challenges exists.

Defendant cites *Miller-El, supra,* 537 U.S. ___ [123 S.Ct. 1029], in support of his argument that a prima facie case existed here. In *Miller-El,* the prosecution conceded in

the high court that the defendant had established a prima facie case. (*Id.* at p. ___ [123 S.Ct. at p. 1040].) But the evidence the defendant presented in that case was far stronger than here. The defendant there presented several types of evidence to the original trial court: (1) the statistical disparity of peremptory challenges of African-Americans (10 of 11 were challenged) compared to others (4 of 31 were challenged); (2) a comparison of the manner in which the prosecution questioned African-Americans and others, which suggested "that the manner in which members of the venire were questioned varied by race" (*id.* at p. ___ [123 S.Ct. at p. 1037]); (3) a comparison of the answers of prospective jurors akin to the comparative juror analysis defendant attempts here to present for the first time on appeal (*id.* at p. ___ [123 S.Ct. at p. 1043]); (4) the prosecution's use of a procedural practice unknown in California called "jury shuffling," which can be used to manipulate which prospective jurors are actually called;[8] and (5) evidence that the district attorney's office historically had a pattern and practice of racial discrimination in voir dire.

Here, defendant's showing in the trial court consisted primarily of the statistical disparity of peremptory challenges between African-Americans and others. Regarding this type of evidence, *Miller-El* stated that "the statistical evidence alone raises some debate as to whether the

[8] "On at least two occasions the prosecution requested shuffles when there were a predominate number of African-Americans in the front of the panel," with the result that the African-Americans were spread out more randomly and thus less likely to be called. (*Miller-El, supra,* 537 U.S. at p. ___ [123 S.Ct. at p. 1038].)

prosecution acted with a race-based reason when striking prospective jurors. The prosecutors used their peremptory strikes to exclude 91% of the eligible African-American venire members, and only one served on petitioner's jury. In total, 10 of the prosecutors' 14 peremptory strikes were used against African-Americans. Happenstance is unlikely to produce this disparity." (*Miller-El, supra,* 537 U.S. at p. ___ [123 S.Ct. at p. 1042].) Here, the number of strikes is smaller, and thus perhaps more explainable by happenstance: three of the prosecutors' 12 peremptory strikes were used against African-Americans. In one respect, however, the percentages are even worse: the prosecutor challenged all three (100 percent) of the eligible African-Americans. But the high court did not cite the statistical evidence to show that it alone necessarily established a prima facie case, but only to support the overall conclusion that the merits of the habeas corpus petition were sufficiently debatable that the federal appellate court should have permitted an appeal. Here, both the trial court and this court have considered the issue on the merits. The statistics here are indeed troubling and, as the trial court stated, the question was close, but, for the reasons explained, we see no basis to overturn the trial court's carefully considered ruling.

Defendant and the dissent (dis. opn., *post,* at p. 1340) also argue that the district attorney asked no questions of the African-American jurors he challenged. This circumstance may also be relevant. (*Wheeler, supra,* 22 Cal.3d at p. 281.) But this trial occurred in 1998, at a time the trial court had primary responsibility for conducting voir dire. (Code Civ. Proc., former § 223, as added by Prop. 115, approved by voters at Prim. Elec., June 5, 1990.) The district attorney asked no questions of any prospective

juror, including the nine of other ethnic groups he also challenged. Thus, asking no questions was of little or no significance here.

III. Conclusion

California's reviewing courts are as ready as any to combat the pernicious effects of racial and other improper discrimination, in jury selection as in other matters. (E.g., *People v. Silva* (2001) 25 Cal.4th 345, 386 [106 Cal.Rptr.2d 93, 21 P.3d 769] [reversing a sentence of death because of error as to a single prospective juror].) But, like the United States Supreme Court, we necessarily, yet confidently, rely primarily on the good judgment of our trial courts to make the difficult determinations the procedures established in *Batson, supra,* 476 U.S. 79, and *Wheeler, supra,* 22 Cal.3d 258, require. The record in this case provides no reason to believe the trial court here failed to perform its duty properly.

Accordingly, we reverse the judgment of the Court of Appeal and remand the matter for further proceedings consistent with our opinion.

George, C. J., Baxter, J., Brown, J., and Moreno, J., concurred.

WERDEGAR, J., Concurring and Dissenting. – I concur in parts I, II.A and II.C of the majority opinion. With respect to the proper standard of proof for establishing a prima facie showing under *People v. Wheeler* (1978) 22 Cal.3d 258 [148 Cal.Rptr. 890, 583 P.2d 748] and *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69], I dissent and join part II of Justice Kennard's dissenting opinion.

KENNARD, J., Dissenting. – A peremptory challenge is presumed to have been based on valid grounds. If a defendant seeks to rebut this presumption, claiming that a prosecutor is improperly using peremptory challenges to remove prospective jurors solely because of group bias, the defendant must first establish a prima facie showing of discriminatory use.[1] (*Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69] (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 [148 Cal.Rptr. 890, 583 P.2d 748] (*Wheeler*).) If the trial court finds that a prima facie case has been established, it will ask the prosecutor to explain the basis for the peremptory challenges. If, after hearing the explanations, "the court finds that the burden of justification is not sustained as to any of the questioned peremptory challenges, the presumption of their validity is rebutted ... and it must dismiss the jurors thus far selected." (*Wheeler, supra,* at p. 282.)

This case presents two issues concerning motions based on *Wheeler* and *Batson* objecting to prosecutorial peremptory challenges: (1) Should this court use comparative juror analysis – comparing the challenged jurors with others who were not challenged – in reviewing the trial court decision that defendant had failed to establish a prima facie showing that the prosecutor's challenges had a discriminatory purpose? (2) What must a defendant prove

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[1] I speak of a prosecutor's use of peremptory challenges and a defendant's objection because this case, like both *Wheeler* and *Batson,* arose in that factual setting. The principles of those decisions, however, also apply to peremptory challenges by a criminal defendant (*Georgia v. McCollum* (1992) 505 U.S. 42 [112 S.Ct. 2348, 120 L.Ed.2d 33]) and to challenges by parties to civil cases (*Edmonson v. Leesville Concrete Co., Inc.* (1991) 500 U.S. 614 [111 S.Ct. 2077, 114 L.Ed.2d 660]).

to make that initial prima facie showing of discriminatory purpose? On the first question, the majority relies on *People v. Johnson* (1989) 47 Cal.3d 1194 [255 Cal.Rptr. 569, 767 P.2d 1047], to hold that an appellate court ordinarily should not use comparative jury analysis in reviewing a trial court's denial of a *Wheeler-Batson* motion if the defendant has not raised that analysis in the trial court. I agree with that result, but would reach it by a different route. On the second question, the majority upholds the trial court's ruling finding no prima facie case on the ground that defendant failed to show that it is more likely than not that the peremptory challenges had a discriminatory purpose. I disagree with this standard, and would hold that a defendant need only prove facts that, if unexplained, permit a reasonable inference of discriminatory purpose. Even without using comparative juror analysis, the record here shows that defendant met that standard.

I

Comparative juror analysis involves comparing the challenged jurors to jurors who were not challenged to determine whether a proffered reason for a challenge is genuine or pretextual. For example, if the prosecution says it challenged juror A for not having a high school education, it would be of interest whether the prosecution challenged jurors B and C who also lack that education. If the prosecutor did, that would suggest that the proffered ground for challenge was genuine; if not, it would suggest there was probably some other reason for the challenge to juror A. Here, the trial court found defendant had not established a prima facie showing that the prosecutor's challenges had a discriminatory purpose because, in the court's view, the record showed neutral reasons why the

prosecutor might have challenged the jurors in question. The defense could have used comparative juror analysis to question those reasons, but it did not do so. By failing to use comparative juror analysis in the trial court, the defense not only deprived the prosecution of the opportunity to explain the pattern of its preemptive challenges to the trial court, but it also deprived the trial court of the opportunity to evaluate that explanation in the context of the voir dire the court observed.

It is well settled that ordinarily an appellate court will not consider a theory not raised at trial. (See generally 1 Appeals & Writs in Criminal Cases (Cont.Ed.Bar 2d ed. 2000) § 1.165, pp. 164.2-165, and cases there cited; Erwin et al., Cal. Criminal Defense Practice (2002) § 101.35, pp. 108-112 and cases there cited.) "The general rule confining the parties on appeal to the theory advanced below is based on the rationale that the opposing party should not be required to defend for the first time on appeal against a new theory that 'contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial.' [Citation.]" (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742 [336 P.2d 534].) There are many examples. (See, e.g., *People v. Carrera* (1989) 49 Cal.3d 291, 324 [261 Cal.Rptr. 348, 777 P.2d 121] [appellant cannot raise new ground for claiming evidence was inadmissible]; *People v. Raley* (1992) 2 Cal.4th 870, 898 [8 Cal.Rptr.2d 678, 830 P.2d 712] [constitutional contention cannot be raised on appeal when issue was argued only on statutory grounds in the trial court].) Because defendant here failed to use comparative jury analysis in the trial court, this rule precludes defendant from arguing that theory on appeal.

The majority reaches the same conclusion, but instead of basing that conclusion on well-settled principles of appellate review, it relies on a special California rule barring appellate courts from undertaking comparative juror analysis. This rule derives from *People v. Johnson, supra,* (1989) 47 Cal.3d 1194 (*Johnson*). Although the recitation of facts in *Johnson* suggests that the defendant did not use a comparative juror analysis in arguing his *Wheeler* motion at trial, the reasoning of this court did not rest on that fact. Instead, the *Johnson* majority gave three reasons for eschewing use of comparative jury analysis: (1) that a trial judge could not reasonably be expected to make detailed comparisons of jurors midtrial; (2) that comparative juror analysis does not properly take into account the variety of factors and considerations that influence the decision whom to challenge; and (3) that a comparative juror analysis by an appellate court on a cold record is less reliable than the decision of the trial court, which can observe the jurors and appreciate the setting of the challenges. (*Id.* at pp. 1220-1221.)

Because those reasons apply whether or not the defendant argues comparative juror analysis in the trial court, the more reasonable reading of *Johnson* is that it barred the use of comparative juror analysis on appeal whether or not that approach was urged before the trial court. Later decisions of this court followed *Johnson* and without exception rejected comparative juror analysis. None says that the reason for not engaging in comparative juror analysis was that the defendant did not raise the matter at trial; many do not even indicate whether the defendant urged comparative jury analysis in support of the motion in the trial court. (See, e.g., *People v. Catlin* (2001) 26 Cal.4th 81, 119, fn. 5 [109 Cal.Rptr.2d 31, 26 P.3d 357]; *People v. Ayala* (2000) 24 Cal.4th 243, 270 [99 Cal.Rptr.2d 532, 6 P.3d 193]; *People v. Jones* (1998) 17 Cal.4th 279, 295 [70 Cal.Rptr.2d 793, 949 P.2d 890]; *People v. Turner* (1994) 8 Cal.4th 137, 164 [32 Cal.Rptr.2d 762, 878 P.2d 521].)[2] In *People v. Montiel* (1993) 5 Cal.4th 877, 911 [21 Cal.Rptr.2d 705, 855 P.2d 1277], this court refused to use comparative jury analysis on appeal even though the prosecutor had used that analytic technique at trial to justify his peremptory challenges.

But a unique California rule barring comparative juror analysis on appeal, even if that technique were used in the trial court, would be constitutionally suspect under the recent United States Supreme Court decision in *Miller-El v. Cockrell* (2003) ___ U.S. ___ [123 S.Ct. 1029, 154 L.Ed.2d 931] (*Miller-El*).[3] In *Miller-El,* the question before the Supreme Court was whether the defendant's *Batson* claim was an appealable issue under 28 United States Code section 2253(c)(2), which requires that the appellant demonstrate "a substantial showing of the

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[2] *People v. Crittenden* (1994) 9 Cal.4th 83 [36 Cal.Rptr.2d 474, 885 P.2d 887], is not necessarily an exception to this pattern. The defendant there did raise comparative juror analysis at trial. On appeal, this court did not review the defendant's analysis and compare individual jurors, but said that the analysis was inapplicable because the defendant was comparing the challenged Black jurors to other jurors who had also been removed by peremptory challenge.

[3] I was not yet on the court in February of 1989 when it decided *Johnson, supra,* 47 Cal.3d 1194, but I followed that precedent and concurred in post-*Johnson* decisions rejecting comparative juror analysis. The United States Supreme Court's 2003 decision in *Miller-El, supra,* ___ U.S. ___ [123 S.Ct. 1029] has led me to reconsider the basis for this court's rejection of comparative juror analysis on appeal.

denial of a constitutional right." The majority used comparative juror analysis to conclude that the defendant should have been given a certificate of appeal. (*Miller-El, supra,* ___ U.S. at p. ___ [123 S.Ct. at pp. 1042-1043].) Justice Scalia, concurring, also applied comparative juror analysis. (___ U.S. at p. ___ [123 S.Ct. at pp. 1047-1048] (conc. opn. of Scalia, J.).) In dissenting, Justice Thomas disagreed with conclusions of the majority's comparative juror analysis, but not with the appropriateness of the technique. (___ U.S. at p. ___ [123 S.Ct. at p. 1053] (dis. opn. of Thomas, J.).)

The United States Supreme Court ruling in *Miller-El, supra,* ___ U.S. ___ [123 S.Ct. 1029], was made on what could be termed a "chilly," if not a "cold," record. When the jury was selected, the defendant objected to its composition but did *not* use comparative juror analysis. Two years later, after the high court's intervening decision in *Batson, supra,* 476 U.S. 79, the case was remanded to the trial court. The original prospective jurors were not present, and it is open to question how much the trial court could recall of the demeanor and body language of prospective jurors or the circumstances of the challenges. The trial court's ruling on remand was based on a cold record – the written questionnaires and the transcript of the voir dire – plus new testimony offered by the prosecutors to explain their challenges. Yet the United States Supreme Court noted no difficulty in using comparative juror analysis under those circumstances. The unhesitating use of comparative juror analysis by all Supreme Court justices in *Miller-El* is a striking contrast to the language of *People v. Arias* (1996) 13 Cal.4th 92, 136, footnote 16 [51 Cal.Rptr.2d 770, 913 P.2d 980], where this court declared that comparative juror "analysis is largely beside the

point, because it ignores the legitimate subjective concerns 'that go into a lawyer's decision to select certain jurors while challenging others that appear to be similar [on the cold record].'" *Miller-El* shows that comparative jury analysis is very much on point when the trial court or the appellate court analyzes the prosecution's explanations for its peremptory challenges. Although the majority here reinterpret *Johnson, supra,* 47 Cal.3d 1194, to permit appellate consideration of comparative juror analysis when that issue was raised at trial, it does not repudiate language from *Johnson, Arias,* at page 136, and other cases denigrating that technique – language which is not in harmony with the United States Supreme Court opinions in *Miller-El.*

The rules of appellate review are clear and simple: With certain exceptions, none applicable here, a party cannot raise on appeal an issue the party neglected to raise at trial. There is no reason to go beyond those rules to perpetuate a separate doctrine that bars a party from raising comparative juror analysis on appeal when it has not been raised at trial.

II

In *Wheeler, supra,* 22 Cal.3d 258, we used two different phrases to describe the standard for a prima facie case. We first said that the moving party "must show a *strong likelihood* that such persons are being challenged because of their group association rather than because of any specific bias." (*Id.* at p. 280, italics added.) We also said, however, that upon the presentation of the moving party's evidence, "the court must determine whether a *reasonable inference* arises that peremptory challenges are being used

on the ground of group bias alone." (*Id.* at p. 281, italics added.) Later cases have debated whether these two phrases state the same standard or two different standards. (Compare *People v. Box* (2000) 23 Cal.4th 1153, 1188 [99 Cal.Rptr.2d 69, 5 P.3d 130] [same standard] with *Cooperwood v. Cambra* (9th Cir. 2001) 245 F.3d 1042, 1047; and *Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190, 1196-1197 [two different standards].)

The majority here reaffirms *People v. Box, supra,* 23 Cal.4th 1153, and holds that *Wheeler*'s "strong likelihood" and "reasonable inference" language states the same standard. But it then goes beyond *Box* to describe the standard as requiring a defendant seeking to establish a prima facie case to persuade the trial court that it is more likely than not that the prosecution's challenges had a discriminatory purpose. The correct standard, however, is that the defendant must present facts that support a reasonable *inference* of discriminatory purpose. The distinction is subtle but crucial. A defendant will often be able to present facts, such as a pattern of prosecution challenges, from which a reasonable person can infer discriminatory purpose, but it is only at the next stage, when the prosecutor explains or fails to explain the challenges, that the trial court can determine whether the challenges actually were improper. Requiring a defendant to persuade the trial court of the prosecutor's discriminatory purpose at the first *Wheeler-Batson* stage short-circuits the process, and provides inadequate protection for the defendant's right to a fair trial under the equal protection clause of the federal Constitution (*Batson, supra,* 476 U.S. at pp. 84-89 [106 S.Ct. at pp. 1718-1719]) and his right to a representative jury under the state Constitution (*Wheeler, supra,* 22 Cal.3d at pp. 276-277).

Wheeler, as I noted, used two terms – "reasonable inference" and "strong likelihood" – to define a party's initial burden. "Inference" is defined by statute; it is "a deduction of a fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action." (Evid. Code, § 600.) It is presumed that the Legislature, when it enacts a law that uses a term defined in another statute, is aware of the statutory definition. (*Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1030 [130 Cal.Rptr.2d 662, 63 P.3d 220]; *People v. Broussard* (1993) 5 Cal.4th 1067, 1080 [22 Cal.Rptr.2d 278, 856 P.2d 1134].) By the same reasoning, it should be presumed that the *Wheeler* court was cognizant of the statutory definition of "inference" when it used that term to describe the standard of proof of a prima facie case. California cases elucidate this definition: an inference "is more than a surmise or a conjecture" (*Aguimatang v. California State Lottery* (1991) 234 Cal.App.3d 769, 800 [286 Cal.Rptr. 57]) and must be based on probabilities, not possibilities (*ibid.*); "it is a reasonable deduction from the facts proved and, of course, must be logical" (*Estate of Braycovich* (1957) 153 Cal.App.2d 505, 512 [314 P.2d 767]). An inference, however, is permissive, and often a single set of facts can support multiple, conflicting inferences. (See *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 337 [100 Cal.Rptr.2d 352, 8 P.3d 1089] ["If such evidence logically permits conflicting inferences . . . "]; *People v. Cooper* (1991) 53 Cal.3d 771, 809 [281 Cal.Rptr. 90, 809 P.2d 865] ["if the prospective juror's responses are equivocal, i.e., capable of multiple inferences . . . "]; *Pasadena Unified Sch. Dist. v. Commission on Professional Competence* (1977) 20 Cal.3d 309, 314 [142 Cal.Rptr. 439, 572 P.2d 53]

["When more than one inference can be reasonably deduced from the facts . . . "].)

"Likelihood," on the other hand, has no statutory definition. In *People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888 [119 Cal.Rptr.2d 1, 44 P.3d 949], this court said it did not necessarily mean "more likely than not." (*Id.* at p. 916.) We then construed that term to describe a standard less demanding than preponderance of the evidence, holding that consistent with the purpose of the Sexually Violent Predators Act (Welf. & Inst. Code, § 6600 et seq.), a sexual offender should be considered to be "likely" to reoffend "if he or she presents a substantial danger – that is, a serious and well-founded risk – of reoffending." (*Ghilotti, supra,* 27 Cal.4th at p. 916, italics omitted.)

If we merge the two concepts – reasonable inference and strong likelihood – we emerge with the conclusion that the defendant must show facts from which one could logically deduce that there was a substantial danger that the prosecutor's challenges were based on improper grounds. Such a test is less demanding than the majority's requirement of persuading the trial court that discriminatory purpose is more likely than not.

Although past California cases have referred to both the "reasonable inference" and "strong likelihood" standards, none required the defendant to persuade the trial court, at the first stage of a *Wheeler-Batson* proceeding, that the challenges more likely than not had a discriminatory purpose. The vast majority of decisions from other jurisdictions permit the defendant to establish a prima facie case by raising a reasonable inference of discriminatory purpose; they do not require the defendant to persuade the

trial court that discriminatory intent is more likely than not.[4] The majority here cites only two decisions from other states as supporting the standard it adopts. Both offer only weak and uncertain support.

The majority first cites *State v. Gonzalez* (1988) 206 Conn. 391 [538 A.2d 210, 213], where the court said that "a defendant must establish by a preponderance of the evidence a prima facie case of purposeful discrimination." But Connecticut adhered to that rule for only a year. In 1989 the Connecticut Supreme Court, under its authority to supervise the administration of justice, abolished the prima facie case requirement, and established a one-stage procedure. (*State v. Holloway* (1989) 209 Conn. 636 [553 A.2d 166, 171-172].) Quoting a decision of the South Carolina Supreme Court, the Connecticut Supreme Court said: "'Rather than deciding on a case by case basis whether the defendant is entitled to a hearing based upon a *prima facie* showing of purposeful discrimination under the vague guidelines set forth by the United States Supreme Court, the better course to follow would be to hold a *Batson* hearing on the defendant's request whenever the defendant is a member of a cognizable racial group and the prosecutor exercises peremptory challenges to remove

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[4] See *Cooperwood v. Cambra, supra,* 245 F.3d at page 1046; *Jordan v. Lefevre* (2d Cir. 2000) 206 F.3d 196, 200; *Wade v. Terhune, supra,* 202 F.3d at page 1197; *Cent. Ala. Fair Housing Center v. Lowder Realty* (11th Cir. 2000) 236 F.3d 629, 636-637; *Tolbert v. Page* (9th Cir. 1999) 182 F.3d 677, 679; *Tankleff v. Senkowski* (2d Cir. 1998) 135 F.3d 235, 249; *Mahaffey v. Page* (7th Cir. 1998) 162 F.3d 481, 485; *Burks v. Borg* (9th Cir. 1994) 27 F.3d 1424, 1428; *U.S. v. Johnson* (8th Cir. 1989) 873 F.2d 1137, 1140; *U.S. v. Chinchilla* (9th Cir. 1989) 874 F.2d 695, 698; *U.S. v. Chalan* (10th Cir. 1987) 812 F.2d 1302, 1314; *Valdez v. People* (Colo. 1998) 966 P.2d 587, 590.

members of defendant's race from the venire.'" (*State v. Holloway, supra,* 553 A.2d at p. 172, fn. 4, quoting *State v. Jones* (1987) 293 S.C. 54 [358 S.E.2d 701, 703].)

The majority also cites *Stanley v. State* (1988) 313 Md. 50 [542 A.2d 1267], which said that the defendant must "prove by a preponderance of the evidence that the peremptory challenges were exercised in a way that shifts the burden of production to the State." (*Id.* at p. 1277.) But *Stanley* goes on to quote a decision of the Florida Supreme Court that in evaluating a defendant's showing, "'any doubt as to whether the complaining party has met its initial burden should be resolved in that party's favor.'" (*Ibid.,* quoting *State v. Slappy* (Fla. 1988) 522 So.2d 18, 22].) Finally, *Stanley* established a bright-line rule that the exclusion of every member of defendant's racial group established a prima facie case. (*Stanley,* at p. 1284.)

The majority derives its standard not from lower court decisions that directly address the burden of establishing a prima facie case under *Wheeler* or *Batson,* but from references in *Miller-El, supra,* ___ U.S. ___ [123 S.Ct. 1029], and *Batson, supra,* 476 U.S. 79, to cases under title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) involving alleged invidious discrimination in connection with employment. Although neither *Miller-El* nor *Batson* involved the standard for proof of a prima facie case, the majority views the high court's references as a general endorsement of title VII standards and procedures for use in evaluating *Batson* motions. And the majority asserts that in a title VII case, to establish a prima facie case, the plaintiff must prove that unlawful discrimination is more likely than not. (See maj. opn., *ante,* at pp. 1314-1315.)

The majority's analysis, however, oversimplifies and misunderstands title VII procedure. A title VII plaintiff has the ultimate burden of proving discrimination by a preponderance of the evidence, but whether a plaintiff has met that burden is assessed at the last stage in the procedure. To establish a prima facie case in the first stage, a title VII plaintiff is *not* required to show it is more likely than not that the defendant engaged in illegal discrimination. Instead, the title VII plaintiff is required to prove *facts* from which one can *infer* illegal discrimination.

In *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed.2d 668], and later cases the high court said that a plaintiff alleging unlawful discrimination must, to establish a prima facie case, prove certain specific facts and actions[5] "from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under the Act.'" (*Furnco Construction Corp. v. Waters* (1978) 438 U.S. 567, 576 [98 S.Ct. 2943, 2949, 57 L.Ed.2d 957], quoting *Teamsters v. United States* (1977) 431 U.S. 324, 358 [97 S.Ct. 1843, 1866, 52 L.Ed.2d 396].)

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[5] The specific facts and actions the plaintiff must prove to establish a prima facie case of discriminatory purpose under *McDonnell Douglas* are: "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." (*McDonnell Douglas Corp. v. Green, supra,* 411 U.S. at p. 802 [93 S.Ct. at p. 1824].)

Texas Dept. of Community Affairs v. Burdine (1981) 450 U.S. 248 [101 S.Ct. 1089, 67 L.Ed.2d 207], a title VII case, further explained this same standard. It said: "The burden of establishing a prima facie case of disparate treatment is not onerous. The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which *give rise to an inference of unlawful discrimination.*" (*Burdine, supra,* 450 U.S. at p. 253 [101 S.Ct. at p. 1094], italics added, fn. omitted.)

The next major decision, *St. Mary's Honor Center v. Hicks* (1993) 509 U.S. 502 [113 S.Ct. 2742, 125 L.Ed.2d 407], addressed the question whether the trial court in a title VII action must give summary judgment for the plaintiff if the court had found a prima facie case and determined that the employer's explanation of its action was pretextual. The United States Supreme Court held that the trial court need not give judgment for the plaintiff under those circumstances. The court explained that once a plaintiff has proved facts that give rise to a prima facie case, a presumption of discriminatory purpose arises. The presumption serves the practical function of inducing the defendant to offer an explanation for its actions. (*Id.* at p. 510, fn. 3 [113 S.Ct. at pp. 2748-2749].) Once the defendant offers the explanation, the presumption disappears, and the trial court must decide whether a preponderance of the evidence shows that the employer acted with a discriminatory purpose. (*Id.* at pp. 509-510 and fn. 3 [113 S.Ct. at pp. 2748-2749].)

In *Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133 [120 S.Ct. 2097, 147 L.Ed.2d 105] (*Reeves*) the high court again explained title VII procedure. At issue

in *Reeves* was whether the trial court must give judgment for the defendant if the plaintiff presented no additional evidence to rebut the defendant's explanation of its actions. The court said the defendant was not automatically entitled to judgment under these circumstances; instead, the trier of fact still had the duty to determine at the last stage of the procedure whether the plaintiff had proved discriminatory purpose by a preponderance of the evidence. (*Id.* at pp. 142-143 [120 S.Ct. at pp. 2105-2106].) That decision should take into account "the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false," and the other evidence, if any, presented by the parties. (*Id.* at pp. 148-149 [120 S.Ct. at p. 2109].)

The high court's insistence that the trial court determine whether a defendant acted with discriminatory purpose at the last stage, regardless of the falsity or weakness of the defendant's explanation of its actions, is consistent with its language asserting that at the first stage the plaintiff need only prove facts from which discriminatory purpose can be inferred. It would, however, be difficult to reconcile the United States Supreme Court's position with the view of the majority here. Under the majority's view, when the trial court finds a prima facie case it necessarily finds that the plaintiff has shown it is more likely than not that the employer had a discriminatory purpose. If the employer offers no persuasive explanation, then the trial court, having already found that the plaintiff has met the burden of proof, would have to find for the plaintiff. That indeed is what the Eighth Circuit Court of Appeals held in *Hicks v. St. Mary's Honor Center* (8th Cir. 1992) 970 F.2d 487, and the high court's decision reversing the circuit court's decision (*St. Mary's Honor*

Center v. Hicks, supra, 509 U.S. 502) shows that the Supreme Court does not consider a finding of a prima facie case the equivalent of a finding that the plaintiff has proved discriminatory purpose.

Gay v. Waiters' and Dairy Lunchmen's Union (9th Cir. 1982) 694 F.2d 531, a title VII case, explains in more detail the proof of a prima facie case under *McDonnell Douglas:* "... *McDonnell Douglas* says nothing directly about the need to prove discriminatory intent. '[T]he evident thought was that proof of the four elements warranted an inference of such intent unless the defendant presented at least some evidence in rebuttal.' *Lieberman v. Gant,* 630 F.2d 60, 63 (2d Cir. 1980) (footnote omitted).... [¶] Viewed in this light, the role of the *McDonnell Douglas* prima facie case is closely analogous to its role in general civil litigation: it presents the legal question whether the plaintiff has met his burden of production, coming forward with sufficient probative evidence to permit a rational jury, or court, to find the material facts in his favor, thus avoiding a directed verdict or motion for judgment as a matter of law. A prima facie case of intentional discrimination is established if the plaintiff proves facts 'from which one can infer, if such actions remain unexplained, this it is more likely than not' that the defendant's conduct was racially motivated. *Furnco Construction Corp. v. Waters* [*supra*], 438 U.S. 567, 576 [98 S.Ct. 2943, 2949].... As an inference, it can but need not result in an ultimate judgment for the plaintiff. In other words, a prima facie case under *McDonnell Douglas* is one in which the plaintiff has met his immediate burden of production, but not necessarily his ultimate burden of persuasion." (*Gay v. Waiters' and Dairy Lunchmen's Union, supra,* 694 F.2d at p. 543, fn. 10.)

Tompkins v. State (Tex.Crim.App. 1987) 774 S.W.2d 195, 201, a *Batson* case, relied on title VII cases for the principle that: "A prima facie case represents the minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true."

Guz v. Bechtel National, Inc. (2000) 24 Cal.4th 317 [100 Cal.Rptr.2d 352, 8 P.3d 1089], also described the title VII procedure. This court said that the purpose of the prima facie case requirement was "to eliminate at the outset the most patently meritless claims, as where the plaintiff is not a member of the protected class or was clearly unqualified.... " (*Guz,* at p. 354.) "While the plaintiff's prima facie burden is 'not onerous' [citation], he must at least show '"actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a [prohibited] discriminatory criterion.... '"' [Citations.]" (*Id.* at p. 355.) What actions, when proved by a preponderance of the evidence, give rise to an inference of unlawful discrimination under title VII procedure? The cases answer this question; they are those actions that, *if unexplained,* permit a reasonable inference of an improper purpose or motive. (*Texas Dept. of Community Affairs v. Burdine, supra,* 450 U.S. at p. 254 [101 S.Ct. at p. 1094]; *Furnco Construction Corp. v. Waters, supra,* 438 U.S. at p. 576 [98 S.Ct. at p. 2949].) I focus on the italicized phrase, because it is here that the trial court went wrong in the case before us.

The ultimate issue raised by a *Wheeler-Batson* motion is not whether the trial judge, or an appellate court, can find a possible neutral reason why a prosecutor might want to challenge a juror, but whether the prosecutor's actual reason for the challenge was based on group bias.

"[T]he trial court must determine not only that a valid reason existed but also that the reason actually prompted the prosecutor's exercise of the particular peremptory challenge." (*People v. Fuentes* (1991) 54 Cal.3d 707, 720 [286 Cal.Rptr. 792, 818 P.2d 75]; *People v. Turner* (1986) 42 Cal.3d 711, 721 [230 Cal.Rptr. 656, 726 P.2d 102].)[6]

The threshold for establishing a prima facie case should be relatively low, so that close cases are not decided at the first stage of the inquiry, but only after the trial judge has heard the prosecutor's explanations and is in a better position to determine the propriety of the challenges. In fact, this may be the common practice. This court frequently encounters cases in which the pattern of challenges suggests but does not prove discriminatory purpose and the trial judge asks for an explanation without expressly finding a strong likelihood that the challenges were improper. (See, e.g., *People v. Arias*, *supra,* 13 Cal.4th 92, 136; *People v. Jackson* (1996) 13 Cal.4th 1164, 1197 [56 Cal.Rptr.2d 49, 920 P.2d 1254].) At times prosecutors even volunteer an explanation without being asked. (See, e.g., *People v. Williams* (1997) 16 Cal.4th 635, 664 [66 Cal.Rptr.2d 573, 941 P.2d 752]; *People v. Howard* (1992) 1 Cal.4th 1132, 1153, fn. 3 [5 Cal.Rptr.2d 268, 824 P.2d 1315].) Establishing a low threshold for a prima facie case recognizes that the prosecutor's explanation is often critical to the decision whether the challenge was proper:

[6] In title VII cases, the trial court may find for the employer defendant even if the reason it gave was a sham, if the evidence shows that the defendant gave the false explanation to conceal something other than discrimination, and had a nondiscriminatory reason for its action. (See *Reeves, supra,* 530 U.S. at p. 148 [120 S.Ct. at p. 2108].) But the nondiscriminatory reason must be the *defendant's* reason.

just as a reasonable explanation will dispel the suspicion of group bias, "[p]roof that [an] explanation is unworthy of credence is . . . probative of intentional discrimination, and it may be quite persuasive." (*Reeves, supra,* 530 U.S. at p. 147 [120 S.Ct. at p. 2108] [title VII case].) The approach set out by the majority would, by contrast, compel trial judges to make decisions when they can only speculate as to the basis for the challenges.

Here defendant showed that the prosecutor challenged all three Blacks on the jury panel, used a disproportionate number of his peremptory challenges against members of that racial group, and failed to engage in any questioning whatever of any these prospective jurors notwithstanding invitations to do so by the trial court. With respect to two of the three jurors, there is nothing in their oral or written responses that stands out to show they would be unacceptable jurors.

Of course there still may be neutral explanations for the challenges, and if it is apparent that the prosecutor had neutral reasons for the challenges, then the pattern of challenges would not give rise to an inference of discriminatory purpose. In such cases the trial court need not find a prima facie case. (See *People v. Bittaker* (1989) 48 Cal.3d 1046, 1092 [259 Cal.Rptr. 630, 774 P.2d 659]; *People v. Howard, supra,* 1 Cal.4th 1132, 1205 (dis. opn. of Kennard, J.).) But that rule should not apply when the trial court can only speculate on the basis for the challenges. (*Howard, supra,* at p. 1207.) The prosecutor does not need to have reasonable grounds for challenging a juror; the challenge passes constitutional scrutiny if it is based on any nondiscriminatory ground. (See *Purkett v. Elem* (1995) 514 U.S. 765, 768 [115 S.Ct. 1769, 1771, 131 L.Ed.2d 834] [prosecutor did not like juror's haircut].) The

ability of the trial court to find such a neutral explanation should not defeat the defendant's prima facie case when it is not apparent that the explanation was the true reason for the challenge. In the case before us, for example, the trial court said one reason for the prosecution's challenge of Juror S. E. could have been her answer to question No. 63 on the juror questionnaire. In that answer, S. E. expressed sympathy for the *victim*. Such sympathy would have been a neutral basis for a challenge, but was not an obvious basis for a prosecution challenge because a prosecutor would generally view a juror who expressed sympathy for the victim as a favorable juror. The other explanations for the prosecutor's challenges suggested by the trial court are also implausible. Thus, the pattern of prosecution challenges here created a reasonable inference of discriminatory purpose, which in the absence of any explanation from the prosecutor is not overcome by the possibility that the challenges could have been based on neutral grounds.

The trial court should have found a prima facie case and asked the prosecutor to explain the basis for the challenges. The court's failure to do so is error, and reversible per se. (See *People v. Fuentes, supra,* 54 Cal.3d at p. 715; *People v. Snow* (1987) 44 Cal.3d 216, 226-227 [242 Cal.Rptr. 477, 746 P.2d 452]; *People v. Turner, supra,* 42 Cal.3d at p. 728.)

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December 1, 2003

Mr. Stephen B. Bedrick
1970 Broadway
Suite 1200
Oakland, CA 94612

Re: Jay Shawn Johnson
v. California
No. 03-6539

Dear Mr. Bedrick:

The court today entered the following order in the above entitled case:

The motion of petitioner for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted limited to the following Question: Whether to establish a prima facie case under Batson v. Kentucky, 476 U.S. 79 (1986), the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias?

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

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541 U.S. ___ (2004)

Per Curiam

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SUPREME COURT OF THE UNITED STATES

No. 03-6539

JAY SHAWN JOHNSON, PETITIONER *v.* CALIFORNIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

[May 3, 2004]

PER CURIAM.

We granted certiorari in this case to review a decision of the Supreme Court of California interpreting *Batson* v. *Kentucky*, 476 U. S. 79 (1986). 540 U. S. ___ (2003). The case was briefed and argued, but we now conclude that we are without jurisdiction in the matter.

The California Supreme Court reversed the California Court of Appeal's decision reversing petitioner's conviction. 30 Cal. 4th 1302, 71 P. 3d 270 (2003). The Court of Appeal held that petitioner was entitled to relief under *California* v. *Wheeler*, 22 Cal. 3d 258, 583 P. 2d 748 (1978), and *Batson* v. *Kentucky, supra*. 88 Cal. App. 4th 318, 105 Cal.

Rptr. 2d 727 (2001). It also noted petitioner's separate evidentiary and prosecutorial misconduct claims, App. 87, but did not determine whether those claims would independently support reversal of petitioner's conviction. The California Supreme Court addressed only the *Wheeler/Batson* claim, and, after reversing on that ground, remanded "for further proceedings consistent with [its] opinion." 30 Cal. 4th., at 1328, 71 P. 3d, at 287.

Under 28 U. S. C. §1257, our jurisdiction is limited to review of "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." In *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975), we described four exceptional categories of cases to be regarded as "final" on the federal issue despite the ordering of further proceedings in the lower state courts. In a post-oral-argument supplemental brief, petitioner argues that the fourth of these categories fits this case. That category involves situations:

> "where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." *Id.*, at 482-483.

Here, petitioner can make no convincing claim of erosion of federal policy that is not common to all decisions rejecting a defendant's *Batson* claim. The fourth category therefore does not apply. See *Florida* v. *Thomas,* 532 U. S. 774, 780 (2001). "A contrary conclusion would permit the fourth exception to swallow the rule." See *Flynt* v. *Ohio,* 451 U. S. 619, 622 (1981) (*per curiam*).

The present case comes closest to fitting in the third *Cox* category, but ultimately falls outside of it. That category involves "those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox Broadcasting, Corp., supra,* at 481. In the event that the California Court of Appeal on remand affirms the judgment of conviction, petitioner could once more seek review of his *Batson* claim in the Supreme Court of California-albeit unsuccessfully-and then seek certiorari on that claim from this Court.

Compliance with the provisions of §1257 is an essential prerequisite to our deciding the merits of a case brought here under that section. It is our obligation to raise any question of such compliance on our own motion, even though counsel has not called our attention to it. See, *e.g., Mansfield, C. & L. M. R. Co.* v. *Swan,* 111 U. S. 379, 384 (1884). But as the present case illustrates, we are not always successful in policing this gatekeeping function without the aid of counsel.

Part of the problem was that the California Court of Appeal's decision was certified by that court for partial publication. It addressed the *Wheeler/Batson* claim in the published portion. 88 Cal. App. 4th 318, 105 Cal. Rptr. 2d

727 (2001). In the unpublished portion, the court briefly addressed petitioner's evidentiary claims to provide guidance for the trial court on retrial, and noted that it would not address whether petitioner's objections were properly preserved or consider petitioner's prosecutorial misconduct claim. App. 58. Petitioner appended only the published portion of the California Court of Appeal's decision to his petition for a writ of certiorari. This Court's Rule 14.1(i) instructs petitioners to include, *inter alia*, any "relevant opinions . . . entered in the case" in the appendix to the petition for certiorari. The full opinion of the California Court of Appeal was not filed in this Court until the joint appendix to the briefs on the merits was filed. App. 58-112. Had the full opinion been brought to this Court's attention, it might have been more evident to us that the Supreme Court of California's decision was not final for the purposes of §1257.

A petition for certiorari must demonstrate to this Court that it has jurisdiction to review the judgment. This Court's Rule 14.1(g). And a respondent has a duty to "address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." Rule 15.2. Our Rules also require that each party provide a statement for the basis of our jurisdiction in its brief on the merits. Rule 24.1(e). At all stages in this case, both parties represented that our jurisdiction was proper pursuant to §1257(a). Pet. for Cert. 1; Brief in Opposition 1; Brief for Petitioner 1; Brief for Respondent 1.

It behooves counsel for both petitioner and respondent to assure themselves that the decision for which review is sought is indeed a "[f]inal judgmen[t]" under §1257. Such attention is mandated by our Rules and will avoid the

expenditure of resources of both counsel and of this Court on an abortive proceeding such as the present one.

We dismiss the case for want of jurisdiction.

It is so ordered.

Filed 8/5/04
after reversal and remand by California Supreme Court
of partially published opinion filed April 5, 2001

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JAY SHAWN JOHNSON, Defendant and Appellant.	A085450 (Contra Costa County Super. Ct. No. 96-0691-4)
In re JAY SHAWN JOHNSON, on Habeas Corpus.	A106431

Introduction

(Filed Aug. 5, 2004)

We come to this case on remand from the California Supreme Court, following its reversal of our previous decision. Defendant Jay Shawn Johnson was convicted of second degree murder of Janika Price, the 19-month-old daughter of his girlfriend, and assault resulting in the death of a child under the age of eight (Pen. Code, §§ 187, 273ab).[1] In December 1998, defendant was sentenced to

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[1] The jury convicted defendant upon retrial after a partial reversal on his first appeal. In the first appeal (*People v. Johnson* (July 27, 1998,

(Continued on following page)

15 years to life imprisonment on the murder conviction to run concurrently with the three-year term for corporal injury on a cohabitant.

On appeal from his conviction in the current trial, we reversed the judgment on the grounds that the trial court erred when it failed to find a prima facie case of a violation of *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*) and that defendant was entitled to relief under *Wheeler* and *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*). Justice Haerle dissented. (See *People v. Johnson* (Apr. 5, 2001, A085450).) In our previous opinion in this appeal, reversing the conviction, we also noted defendant's separate evidentiary and prosecutorial misconduct claims, but did not determine whether these would independently support reversal of the conviction. (*Id.*, typed opn. at pp. 22-29.) The California Supreme Court granted review and reversed our decision reversing defendant's conviction. (*People v. Johnson* (2003) 30 Cal.4th 1302.) It addressed only the *Wheeler/Batson* issue and remanded to this court for further proceedings. (*People v. Johnson, supra,* at p. 1328.)[2] Accordingly, with respect to defendant's

A076360)), we affirmed defendant's conviction of corporal injury on a cohabitant, Janika's mother Jennifer Shelton (Pen. Code, § 273.5), but reversed his convictions of second degree murder and assault on a child leading to death for error in jury instructions on the cause of death. There have been three trials in this case. The first ended in a mistrial. The second trial before Judge Westover resulted in the first appeal and is referred to by the parties as the "prior" trial. The third trial, which the parties refer to as the "current" trial, occurred in December 1998 before Judge Sepulveda, and is the subject of the instant appeal.

[2] The United States Supreme Court granted certiorari to review the California Supreme Court's decision interpreting *Batson, supra,* 476 U.S. 79. After briefing and argument in the United States Supreme Court, the court concluded it was without jurisdiction in the matter because the judgment was not final as the remaining issues had not

(Continued on following page)

Wheeler/Batson claim, we must conclude that the trial court did not err in finding that defendant failed to establish a prima facie case of such violation. We turn to the remaining issues in the case.

Statement of Facts

The murder victim, 19-month-old Janika Price, and her mother Jennifer Shelton were living with defendant, his three-and four-year-old sons, and his aunt Linda Green and her son. Defendant was not Janika's father. Shelton had known defendant for six or seven months and had moved in with him, but it was not a good relationship. Defendant was physically abusive to Shelton and beat her frequently.

On February 19, 1996, defendant and Shelton argued about Janika. Shelton complained that defendant played too roughly with Janika. Defendant accused Shelton of spoiling Janika. Defendant hit Shelton in the face, kicked her in the foot, and kicked her again as she lay on the floor. When defendant left, Shelton fell asleep in the bedroom. She woke up when she heard Janika crying. The crying was unusual and sounded like Janika was hurt. A few minutes later, Shelton went into Janika's room and found her lying on her bed with her face to the wall. Shelton leaned down to kiss Janika and noticed she was pale and wheezing. Shelton asked defendant whether something was wrong with Janika. Defendant said Janika had thrown up, and he had cleaned her up and put her in

been finally determined following remand and appellate review. (*Johnson v. California* (2004) 541 U.S. ___, No. 03-6539.)

bed. Shelton picked Janika up, discovered she was limp, and brought her into the living room.

Shelton called 911. In the meantime, defendant came in, picked up Janika, and gave her some water. Janika drank the water, but went limp again. Paramedic Robert Duvall arrived at 10:31 p.m., within three minutes of the 911 call. He asked what had happened, and defendant told him Janika had fallen out of her crib around 4:00 p.m. but had been fine until the 911 call. Duvall observed a bruise on Janika's forehead that was consistent with a fall. There was light bruising and some vomit on her chest. She had no blood pressure or pulse, and her pupils were fixed and dilated. Janika had been dead for at least six minutes.

Dr. Brian Peterson, who performed the autopsy on Janika, testified that the cause of death was blunt force injuries to the chest, causing the heart to rupture. Such injury would cause death within a minute or so. There could be vomiting within this period. Janika's body had other injuries, scars, and bruises that indicated a pattern of child abuse. According to Dr. Peterson, it would take a substantial amount of force, such as a hard punch or a sharp kick, to cause the heart to rupture. Dr. Peterson likened the amount of force to that which an unrestrained driver would suffer in an automobile collision at freeway speed. Accidentally stepping on the child would not have been sufficient to cause the fatal injury.

Detective David Krastof testified that he interviewed defendant twice at the police station on February 20, after Krastof had met with Dr. Peterson. The first interview was videotaped, but only the sound portion was recorded correctly. The second interview was fully videotaped. Both tapes were played for the jury.

In his first interview, defendant initially denied having had a fight with Shelton on the night of Janika's death, but later admitted they had an argument. Defendant said nothing about hitting Shelton. Defendant said he was putting up some posters in the children's room while Janika played with his sons. Janika threw up on her bed. Defendant cleaned her up. Shelton came in, said Janika was not breathing right, and took her into the other room. Defendant claimed he performed cardiopulmonary resuscitation (CPR) on Janika after she stopped breathing, but did so by applying only light pressure. When Krastof said defendant's story did not match reports from the pathologist, defendant asked for a lawyer. Krastof placed defendant under arrest.

A few hours later, after talking to his mother, defendant said he wanted to resume talking. In this second videotaped session, defendant admitted he had a violent fight with Shelton. He dragged Shelton by her hair into the bedroom, slapped and kicked her and then went into the kids' room to clean up. When Janika threw up, defendant cleaned her face and put her down. Shelton came in a little later, picked up Janika, and noticed she was not breathing right. Defendant looked at Janika, gave her some water, and she stopped breathing. Defendant put Janika on the table, breathed into her mouth, and hammered on her chest, twice, "pretty hard."

Krastof advised defendant his story was not consistent with the medical evidence. Defendant then said he had been chasing a rat around the kids' room. While chasing the rat, he accidentally stepped on Janika's chest. He picked her up. She was screaming, but she seemed fine. She threw up right after he put her on the bed. Defendant insisted he did not kick Janika. Krastof

insisted the evidence showed otherwise, and defendant eventually changed his story to say that he had accidentally kicked Janika in the chest when he backed up. Defendant said: "I did kick her. [¶] . . . [¶] I didn't know I kicked her. I didn't know until I explained myself just now, when I jumped back." Defendant said he lied initially because he did not want to be seen as a murderer. Defendant continued to insist that his kicking Janika's chest was an accident.

Detective Krastof saw some small bruise marks on Janika's forehead. He located defendant's BB gun under a boat at a residence two houses away and fired it at the arm of another officer. Krastof testified that the marks made by the BBs on the officer's arm were similar to the marks on Janika's face.

Defendant testified in his own defense. In the early evening on February 19, 1996, he and Shelton had a fight in which he grabbed her by the hair, knocked her down, and kicked her a couple of times. He admitted that he had been violent with Shelton before. After the fight, he went into the children's room to put up some posters and clean it. All three children were there. As he moved the boys' bed, he saw a rat. Defendant put Janika on the bed and asked the boys to help him catch the rat that had run into the closet. He got a BB gun to shoot the rat. The boys shook the clothes, and the rat ran out. Defendant jumped back as the rat came toward him and he stepped on Janika. Janika screamed, and he picked her up to console her.

Several minutes later, Shelton came into the room and said Janika was not breathing right. Defendant's aunt, Linda Green, said the same thing a few minutes later.

Defendant went into the living room where Shelton told him Janika was not breathing. Defendant picked up Janika and gave her some water. Janika stopped breathing and went limp. Defendant told his aunt to call an ambulance and began doing CPR. Defendant hit Janika on the chest, trying to "jump start" her heart, as he had seen it done on television. Defendant denied ever physically abusing or intentionally hurting Janika. He also denied ever shooting her with a BB gun.

Defendant's aunt Linda testified that she had heard the fight in the bedroom, had seen defendant and the boys chasing a mouse, and had previously seen mice in the apartment. She did not hear Janika cry. She confirmed that Janika was breathing "funny," that defendant gave her some water, after which Janika went limp. Defendant tried to administer CPR and hit Janika in the chest in doing so.

To dispute the timing of events provided by defense witnesses, the prosecution offered the rebuttal testimony of defendant's next-door neighbor, Terry Davidson. He heard physical fighting and a woman scream, "You killed her," "Oh my God, she's dead." The police arrived 15 to 20 minutes later.

To rebut defendant's claim that he would not let anything happen to his boys, the prosecution offered the testimony of Tammy Keller, the cousin of defendant's ex-wife. Keller testified that defendant walked in, uninvited, to the apartment she was sharing with defendant's ex-wife on August 27, 1993. He seemed very upset. When the ex-wife called, defendant got on the phone and became even more angry and started screaming, even though the boys were asleep. Defendant ignored Keller's request to lower

his voice and instead proceeded to urinate in the sink on her dishes. The third time she asked him to lower his voice, he ripped the phone out of the wall. Defendant then went on a rampage. He picked up his young son and carried him like a football. While still holding the child, defendant threw a fish tank through a window, broke the glass coffee table, and tried to throw the television set out the window. Defendant bumped the child's head on the door frame and on the television set. Keller tried to stop defendant from leaving with his young son, but defendant pushed past her.

Issues on Remand

On appeal (A085450), defendant has challenged a number of evidentiary rulings and has raised claims of prosecutorial misconduct and ineffective assistance of counsel. In a related petition for habeas corpus, filed on May 11, 2004 (A106431), defendant expands upon his claim of ineffective assistance.[3] Although we briefly addressed some of the evidentiary issues in our previous opinion in this appeal in order to provide guidance to the trial court in the event of retrial, we did not determine whether objections were properly raised and preserved. Nor did we determine whether any errors found were prejudicial. We expressly did not address defendant's claim that the prosecutor committed misconduct by switching theories as to the instrumentality of death, because the issue did not involve an evidentiary ruling.

[3] Pursuant to our request, the Attorney General filed an informal response to the petition on June 9, 2004. (See *People v. Romero* (1994) 8 Cal.4th 728, 737; Cal. Rules of Court, rule 60.)

I.

Prosecutorial Misconduct and Ineffective Assistance of Counsel

On appeal and in the recently filed petition for habeas corpus, defendant contends that he was denied a fair trial because the prosecutor switched theories of the instrumentality of death, from a punch to a kick, between the prior trial[4] and the current trial. He argues the prosecutor committed misconduct by advancing the theory in the current trial that defendant killed Janika by kicking her. He asserts this theory was disproved by the prosecution's own witnesses at the prior trial and that the prosecutor had used that testimony at the prior trial to argue that the victim had been killed by a punch. He further contends, both on appeal and in the writ petition, that his trial counsel rendered ineffective assistance in failing to introduce prior testimony by prosecution witnesses Krastof and Dr. Peterson to the effect that a boot kick did not cause the fatal injury and in failing to either move for a mistrial or to reopen for the taking of additional evidence after closing argument to the jury began.

We find no misconduct by the prosecutor and no prima facie case of ineffective assistance by defense counsel.

A. Prosecutorial misconduct claim

Defendant cites no authority that a switch in theory between trials as to the instrumentality of death

[4] Upon defendant's request, we take judicial notice of the record in the prior appeal (*People v. Johnson, supra*, A076360). (Evid. Code, §§ 451, 452.)

constitutes prosecutorial misconduct and we have found none. Rather, defendant contends the prosecutor offered false evidence and misled the jury as to the forensic and medical facts relating to the manner of Janika's death. He builds his argument upon the American Bar Association Standards for Criminal Justice Prosecution Function and Defense Function (3d ed. 1993) (ABA Standards) and accompanying commentary. These provide in relevant part:

"Standard 3-5.6 Presentation of Evidence: [¶] (a) A prosecutor should not knowingly offer false evidence. . . . " (ABA Standards, *supra,* at p. 100.)

"Standard 3-5.8 Argument to the Jury: [¶] (a) In closing argument to the jury . . . the prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw." (ABA Standards, *supra,* at p. 106.)

"Commentary: [¶] . . . Prosecutorial conduct in argument is a matter of special concern because of the possibility that the jury will give special weight to the prosecutor's arguments, not only because of the prestige associated with the prosecutor's office, but also because of the fact-finding facilities presumably available to the office." (ABA Standards, *supra,* com. to std. 3-5.8, at p. 107.)

Defendant premises his claim of prosecutorial misconduct upon the prosecutor's supposed switch in theory between the prior and current trials as to the cause of Janika's death – from a punch to a kick – which he claims misled the jury and "misstate[d] undisputed medical or forensic facts." Defendant argues that testimony by prosecution witnesses Krastof and Dr. Peterson in the prior trial "totally disproved any kicking theory"; that the

prosecutor "omitted to adduce" and "deliberately withheld" prior testimony by the two, which "fully contradicted the theory that [defendant] kicked Janika to death"; that the prosecutor "argued a factual theory which the prosecutor's own witnesses had totally disproved at the prior trial."

The invalid premise of defendant's argument is that the kicking theory had been "totally disproved by the sworn statements of [the prosecution's] own police and expert witnesses" at the prior trial. At most, the prosecutor changed his emphasis between the two trials as to how defendant killed Janika. At both the prior trial and at the current trial, Dr. Peterson testified that the right atrium of the heart had been ruptured by a "blunt force" trauma. At both trials, Dr. Peterson consistently testified that the best analogy for the force of the blow to the chest was of injuries to adults involved in highway speed car accidents while not wearing seat belts or shoulder harnesses who were thrown against the steering wheels. "Blunt force simply means a blunt object was used to apply this force to the body." Moreover, at the prior trial, Dr. Peterson testified that *he could not say with certainty* whether a punch or a kick to the chest was the source of the blow that caused Janika's heart to rupture.[5] Regarding the absence

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[5] In the prior trial, Dr. Peterson testified: "Now there were no specific patterns on this little girl's body that I could associate with a shaped object. There was no shape of a led [*sic*] pipe. There was no shape of a wrench. There was no particular imprints that was suggestive of knuckles, for example. [¶] So by using the term 'blunt force,' I simply mean that significant force was applied to the chest but in a vague sort of way so as not to leave a pattern .[¶] *And any number of types of force application could have caused that.*" (Italics added.)

Peterson had no doubt that Janika was killed or injured due to abuse. On cross-examination at the prior trial, Peterson again testified that he had found no patterns on the skin. Asked whether it was correct

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that "[i]f someone was to punch a child, you would see an indicator force of fists or knuckles," Peterson replied, "Commonly not, no. It's – it must have something to do with children. The tissues are quite flexible." He testified he had never seen a specific shaped pattern on the abdomen of a child who had been killed by a blow to the abdomen. Nevertheless, a signature force or application pattern was "something we always look for. It's a nice thing to find. If you can find something that matches an object and you can tell the police to look for that object, that's a helpful thing. [¶] So it's one of those features that it's nice if you have it. *Normally you don't have it, particularly on children.*" (Italics added.)

Peterson also was cross-examined regarding the type of surface needed to cause the fatal heart injury.

"Q. . . . [W]hat surface would be needed to cause the atrium destruction that you referred to?

"A. . . . [T]he issue was that there [were] some things that were not there. There was not a bruise to the skin over the breastbone. There was not a fracture of the bone. There was no bleeding inside the muscle. So I don't think it was a point force like the end of a rod or something like that. It was a relatively wider force. *But that could have been a lot of things. It could have been the sole of a foot. It could have been a fist or a wall. It could have been any number of things that were sufficiently wide not to leave a pattern, but sufficiently small to focus force on the heart and rupture it.*" (Italics added.)

"Q. Okay. You also said it could have been the area of a hand, correct?

"A. Yes.

"Q. *But you also said it wouldn't have been a narrow area like a toe; is that correct?*

"A. *Well, I did not see a pattern consistent with that. Could an injury from the toe have been applied and not leave a pattern? I don't think so. But I guess almost anything could happen.* (Italics added.)

"Q. Let's assume a person was wearing a hiking boot with a very defined rounded edge, a tip, okay? Would that area be consistent with the narrow sort of force you're referring to leaving a U or a signature application upon the chest?

"A. Well, I believe that's two separate questions. [¶] *Could that type of force cause this injury? Most certainly.* [¶] *Did I think that it did? No, because there was no such pattern.* (Italics added.)

"Q. Okay. The key question then is you did not see any pattern consistent with the edge of a boot hitting the child chest, correct?

(Continued on following page)

of a definitive mark on the chest, when asked by defense counsel at the current trial whether a kick to the chest with pointy toed boots could cause the particular kind of injury or make a signature mark suggesting that it was a particular kind of boot, the doctor replied: "my answer is always going to be, it depends. . . . [¶] Can I envision a

"A. That's correct."

Asked how the abdominal and chest injuries occurred, Dr. Peterson answered:

"A. [¶] . . . [¶] In terms of injuries, my opinion is that more than likely the child was punched in the abdomen on more than one occasion to account for the older and newer bleeding inside the mesentery. [¶] *As far as the chest injury goes, I can see that happening any number of ways.* I suspect if somebody is willing to punch a . . . child in the stomach, someone could also be willing to punch a child in the chest and that could account for the injury there." (Italics added.)

In discussing the older injury to the abdomen, Dr. Peterson opined that the child had been punched hard enough in the abdomen on more than one occasion to cause the bleeding in the mesentery and perhaps also the microscopic perforation in the bowel. He agreed that a punch was the most likely force to cause the abdominal injuries. Asked whether he was "able to distinguish a punch causing [the abdominal injuries] or could [it] have been a kick, a fall or anything like that to the abdomen area," Dr. Peterson answered: "*It was not a fall. This was inflicted. What I can say for sure is that, again, similar to the chest injury, there was no pattern on the skin. So it could have been a kick. But, again, I did not see a shoe pattern or a sole pattern.* [¶] *Could it have been a punch? Absolutely. An elbow? Sure. Because there was no pattern, I can tell you what wasn't there. But it's harder to say what it must have been. I can tell . . . you what it may have been.*" (Italics added.)

On redirect at the prior trial, the prosecutor showed Dr. Peterson the boot defendant had been wearing that day and asked, "Looking at this shoe, would the injury to the chest, if it was kicked with the top of the tip area like that, would that have been a cause of some of the injuries you observed?" Dr. Peterson answered: "*I guess it could have. Again, I didn't see any specific pattern on the chest. I don't believe that the tip of that shoe would have caused a fatal injury. . . .*" (Italics added.)

specific type of boot leaving a type of pattern? Absolutely. Can I envision not leaving a mark? Absolutely."

However, Dr. Patterson consistently maintained at both trials that the blow was inconsistent with the type of accidental injury claimed by defendant, whether from defendant's accidentally stepping on Janika during defendant's pursuit of the mouse or from the defendant's negligent application of CPR. Nor would a rapid compression of the palm area cause the same kind of compression as the blunt force trauma that occurred here.

At the prior trial, Krastof testified that the brown and green hiking shoes recovered from defendant's house were dirty and that he saw no dirt, footprints, or other marks consistent with marks left by the shoe on the t-shirt Janika had been wearing. No such testimony was elicited by the defense or the prosecution at the current trial. However, defendant did identify the boots (exhibit No. 20) during cross-examination by the prosecutor, but stated they were much dirtier than they had been on the day he kicked Shelton and stepped on Janika. Moreover, at the current trial, defendant testified that, after he stepped on Janika, she threw up and he cleaned up the mess. Shelton also testified that defendant told her that Janika had gotten sick, thrown up, and that he had cleaned her up and put her to bed. The jury could certainly infer that defendant's cleaning up of Janika following her vomiting had included changing her t-shirt.

We conclude that, contrary to defendant's claim, evidence at the prior trial did not *exclude* the possibility that a kick had caused the blunt force trauma that killed Janika. Indeed, in argument at the prior trial, the

prosecutor acknowledged that an intentional kick could have caused the fatal injury.[6]

Nor did the prosecutor's closing argument at the current trial misstate "undisputed medical or forensic facts" as argued by defendant. The prosecutor argued that the child was already dead during defendant's attempt to administer CPR, that the force necessary to cause the injury was not consistent with "that kind of punch" and that it was a "force more consistent with a foot than a fist." Nevertheless, although arguing that defendant kicked Janika to death, the prosecutor acknowledged the possibility that an intentional punch could have been the means of inflicting the trauma. During his final closing argument, the prosecutor argued that defendant had not accidentally

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[6] At the prior trial, the prosecutor referred to the various kinds of abuse suffered by Janika, including being "kicked," "stomped" and "punched." He also argued with respect to defendant's failure to tell the authorities that he had kicked Janika: "What about the kicks? I forgot about the kicks. You forget about the kicks. You kick a child so hard all the air comes out of it; the child throws up; the child is crying and you're sitting there saying, according to your testimony, daddy is sorry. Daddy is sorry. You forget this? Later on the kid stops breathing and this skips your mind? You don't remember that." With respect to the assault instruction, he argued, "In this case, since the child was struck, we know he had the ability. We know the kid was hit by the defendant. We know he assaulted the child. There was no justification for punching the child in the stomach a couple of days before. *There was no justification for stomping on the kid or kicking the kid while they was [sic] in the bedroom.* There was no justification about this alleged CPR." (Italics added.) At the prior trial, the prosecutor argued that the punch to Janika's abdomen, occurring a few days before the blow to the chest, would have proved fatal. He also argued that defendant lied when he said "he never hit the kid, never stepped on the kid. No evidence of that? Yeah, there is. The kid suffered these injuries." He also argued that defendant's claims to have accidentally kicked Janika while trying to catch the mouse and to have injured Janika while performing CPR were unbelievable.

stepped on Janika, stating: "I don't care how you look at it. You want to go with the kick, fine. *You want to go with the punch, fine.*" (Italics added.)

Nor did the prosecution's change of emphasis during the current trial unfairly "surprise" the defense. During pretrial hearings, the prosecution unsuccessfully sought to bring character evidence into it's case-in-chief regarding defendant's modus operandi of kicking when angered. The prosecutor contended that defendant's use of his foot was "the trademark" or a "signature." The prosecutor argued, "And [when defendant] feels that he is provoked, his response [is] to use violence and in a manner particularly of kicking." Defense counsel countered that defendant's kicking Shelton in the foot and nowhere else was not sufficiently connected with the method of death of Janika as "[t]here is no testimony that she [Shelton] was kicked in the torso or stomped on the chest." Defense counsel at that point recalled that in the prior trial he had tried to present through Dr. Peterson evidence of defendant's foot on Janika. "It's my recollection that Doctor Peterson – one of the things I actually was trying to present was the act of the foot by Mr. Johnson on the child's baby (sic). The detective and the Coroner said no foot imprints [were] placed on the child. The baby was wearing a white or clean T-shirt. [¶] And that the detective, when he collected evidence of . . . Johnson's boots, they were very dirty. There were no footprints or none of this left on the child's shirt to suggest that he used his foot to – to kick this child. [¶] So I find it somewhat ironic now on the third trial the People are trying to present a sort of inconsistent argument to get into domestic violence. Mr. Johnson, who kicked Jennifer Shelton in the foot is supposedly to have used a boot that was supposedly dirty to kick the child

when the prosecution witnesses came in to argue contrary to that point of view."

The trial court ruled at that point under Evidence Code section 352 that it would not allow the prosecution to introduce into its case-in-chief "that defendant has an M.O. of kicking people."

At a later point in the pretrial hearings, the court acknowledged that our opinion on the appeal of the prior trial had eliminated the blow to Janika's stomach as a possible cause of death, leaving the possible causes "C.P.R. versus kicking. I guess we might have that. Was it a blow to the chest, a kick? We'll take that up later. [¶] As far as . . . the earlier blow to the stomach versus whatever happened to the chest, the Court of Appeal decided that issue about the stomach blow at least. And we'll take up the other issues after the evidence goes in." Defendant was not and could not have been surprised by the prosecutor's change in emphasis at trial from a punch to a kick.

We find no prosecutorial misconduct.

B. Ineffective assistance claim

Defendant argues on appeal and in his related habeas petition that trial counsel was ineffective when counsel initially failed to introduce the prior testimony of Krastof and Dr. Peterson that a boot kick did not cause the fatal injury and that defense counsel was ineffective in failing either to move for a mistrial when surprised by the prosecutor's switch of theory or to move to reopen for the taking of evidence after jury argument began. We note that defendant was represented by the same counsel at both the prior trial and the current trial.

1. Standard of review

Both the federal and California Constitutions guarantee the right to effective assistance of counsel. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) Defendant carries the burden of rebutting, by a preponderance of the evidence, a presumption that he received effective assistance. (*People v. Garrison* (1989) 47 Cal.3d 746, 788.) The claim of ineffective assistance of counsel involves two components: (1) defendant must show that counsel's performance was deficient, and (2) defendant must establish prejudice. (*Id.* at p. 786; *People v. Ledesma,* at pp. 216-217.)

To be deficient, counsel's performance must have fallen " 'below an objective standard of reasonableness . . . under prevailing professional norms.' [Citations.]" (*People v. Ledesma, supra,* 43 Cal.3d at p. 216.) In applying this prong of the test, courts must exercise deferential scrutiny so as to avoid the dangers of "'second-guessing.'" (*Ibid.*)

Further, except in circumstances not here relevant, prejudice must be affirmatively proved. "[T]o be entitled to reversal of a judgment on grounds that counsel did not provide constitutionally adequate assistance, the petitioner must carry his burden of proving prejudice as a 'demonstrable reality,' not simply speculation as to the effect of the errors or omissions of counsel." (*People v. Williams* (1988) 44 Cal.3d 883, 937.) "'The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" (*People v. Ledesma, supra,* 43 Cal.3d at pp. 217-218.)

"Because a petition for writ of habeas corpus seeks to collaterally attack a presumptively final criminal judgment, the petitioner bears a heavy burden initially to *plead* sufficient grounds for relief, and then later to *prove* them." (*People v. Duvall* (1995) 9 Cal.4th 464, 474.) If the petitioner fails to allege facts that, if true, would entitle him to relief, no prima facie case has been stated and the petition may be summarily denied. (*Id.* at pp. 474-475.)

2. Evidence in support of petition

Because we review defendant's claim pursuant to a habeas petition, our review is not confined to the appellate record. (See, e.g., *People v. Ledesma, supra,* 43 Cal.3d at pp. 218-219; *People v. Gutierrez* (1993) 14 Cal.App.4th 1425, 1438.) Defendant has submitted only the declaration of his appellate counsel, Stephen B. Bedrick, in support of his petition. Appellate counsel relates that defendant's trial counsel Patrick Cannon refused to provide a signed, written declaration in support of the habeas petition. Appellate counsel then relates that trial counsel told appellate counsel that: (1) trial counsel did not realize that the prosecutor had switched theories between trials; (2) trial counsel had spoken with Dr. Peterson before the current trial and thought Dr. Peterson's testimony was going to be the same at the current trial as it had been at the prior trial; (3) trial counsel did not realize during the current trial that Dr. Peterson's testimony was different from his testimony at the prior trial; and (4) trial counsel does not respond to opposing counsel's comments, because they are not evidence. Appellate counsel therefore opines that trial counsel had no valid tactic or strategy for failing to bring out evidence that would have disproved the prosecution's theory that death occurred by kicking.

As the Attorney General points out, the declaration of appellate counsel is "riddled with inadmissible evidence." Specifically, appellate counsel's statements setting forth what trial counsel said to him are entirely inadmissible hearsay. (*People v. Madaris* (1981) 122 Cal.App.3d 234, 242, disapproved on other grounds in *People v. Barrick* (1982) 33 Cal.3d 115, 127; see *In re Fields* (1990) 51 Cal.3d 1063, 1070.) "It has long been the rule of California that factual allegations on which a petition for habeas corpus are based must be 'in such form that perjury may be assigned upon the allegations if they are false.' (*Ex parte Walpole* (1890) 84 Cal. 584.) Here the critical allegations were patently not in such form." (*People v. Madaris, supra,* 122 Cal.App.3d at p. 242.)

In any event, neither the declaration nor the appellate record in this case establish a prima facie case of ineffective assistance.

Were we to consider trial counsel's statements to appellate counsel, they indicate to us that defense counsel did not view the evidence or the prosecutor's argument as involving a radical shift in theory. We have reached the same conclusion with respect to the prosecutorial misconduct claim above. The shift in emphasis was not a major and significant change in theory, as speculated by appellate counsel. The central theory of the prosecution was the evidence that death was caused by an intentional blow to the chest by a blunt force. Whether the blow was from a kick or a punch was ultimately not knowable from the forensic evidence.

Moreover, the record itself shows that defense counsel was well aware of the prosecutor's shift in emphasis. As we have discussed above, counsel was not "surprised" by

the prosecutor' switch in emphasis from the theory at the prior trial that the fatal blow was a punch either to Janika's chest (that evening) or to her abdomen (a day or two before her death), to the theory at the current trial that the fatal blow was a sharp kick to her chest. This indicates a tactical decision by trial counsel to refrain from cross-examining Dr. Peterson regarding his opinion at the prior trial that the fatal blow was probably not a sharp kick with the toe of a boot, and to forego cross-examining Officer Krastof regarding defendant's dirty boots and the lack of dirt marks on the t-shirt Janika was wearing.

Defense counsel argued, in the current trial, that defendant was not guilty of second degree murder as defendant had no intent to kill Janika when he either accidentally stepped on her and/or when he incorrectly administered CPR. Defense counsel contended that at most defendant was guilty of involuntary manslaughter. Counsel relied upon defendant's testimony that defendant was startled by a mouse, jumped back and accidentally stomped on Janika and, when Janika began having difficulty breathing, that defendant incorrectly gave her CPR by "rather stupidly" hitting her in the chest to try to revive her.

Given that a key part of the defense was defendant's story about accidentally stepping on Janika during pursuit of the mouse, the lack of a boot imprint or a dirty t-shirt could serve to highlight the likely falsity of that defense. Furthermore, defense counsel did ask Dr. Peterson at the current trial about the likelihood that a pointy-toed boot would leave a mark and the doctor testified that such a blow might leave a mark and might not. In addition, the boots *were* introduced into evidence during defendant's testimony and he stated they were "dirtier" than they had

been the night Janika was killed. There was no need to cross-examine Krastof regarding them.

A fortiori, given the likely tactical decision not to undermine defendant's story that he accidentally stepped on or kicked Janika by eliciting testimony that a kick was less likely the cause of death than a punch, and the fact defendant was not surprised by the prosecutor's emphasis on a kick, defense counsel's failure to move for a mistrial or to move for reopening of evidence upon the prosecutor's argument was a reasonable tactical choice.

In any event, defendant has not carried his burden of establishing prejudice from any claimed ineffective assistance as a demonstrable reality. The evidence showed that a sharp blow to the chest – either a punch or a kick – caused Janika's death. Had defense counsel tried to impeach Dr. Peterson with his prior testimony that he had not seen an injury consistent with a kick from the boot toe and that he thought such a blow would leave a pattern, the prosecution would doubtless have introduced Dr. Peterson's qualifying remarks at the prior trial that "almost anything could happen" and that that type of force "[m]ost certainly" could have caused this injury, and his overall recognition that it "could have been a lot of things. It could have been the sole of a foot. It could have been a fist or a wall. It could have been any number of things that were sufficiently wide not to leave a pattern, but sufficiently small to focus force on the heart and rupture it." Such a blow was inconsistent with defendant's accidentally stepping on Janika and with the application of CPR by defendant. The jury necessarily found defendant was not credible and that he had killed Janika with malice.

Defendant has failed to state a prima facie case of ineffective assistance of counsel.

II.

The Videotaped Interviews

Defendant next contends on appeal that the trial court erred in admitting lay opinions of Police Officers Krastof and Cope contained in the videotapes of their two interviews with defendant, during which they repeatedly stated their opinions that defendant was lying. In our previous opinion in this appeal, we stated: "A police officer's personal opinion regarding the credibility of an interviewee generally is inadmissible either as lay testimony or as expert testimony and should have been redacted upon proper objection. (*People v. Melton* (1988) 44 Cal.3d 713, 744; *People v. Smith* (1989) 214 Cal.App.3d 904, 915-916; *People v. Sergill* (1982) 138 Cal.App.3d 34, 40.)" (*People v. Johnson, supra,* A085450, typed opn. at pp. 26-27.)

The parties dispute whether the error was waived by defense counsel who, despite raising objections to the officers' opinions on the tape before it was played, never sought to redact specific parts of the officers' opinions when given the opportunity to do so by the court. Before the first interview tape was played for the jury, defense counsel objected only to the reference to acts of domestic violence against other individuals, which objection was sustained. The court then inquired whether defense counsel had other objections, asking: "Mr. Cannon, are you satisfied now? Have you gone through the transcript and you're satisfied there's nothing else that you want taken out?" Defense counsel replied, "I'm hoping not." The court also urged defense counsel to review "the next tape to

make sure that everything is redacted that's supposed to be." The next day, the court sought to confirm that defense counsel had "had an opportunity to go through the second tape of the Defendant's statement to the police." Defense counsel acknowledged that he had and when asked whether it was "properly redacted," defense counsel confirmed, "It's acceptable, Your Honor." At no point in either discussion with the court did defense counsel object to the statements defendant now challenges, nor alert the court to his previously expressed concerns and seek a final ruling on the matter. Clearly, the claim was waived. (Evid. Code, § 353; *People v. Rowland* (1992) 4 Cal.4th 238, 259 [waiver by failure to secure a ruling].)

In any event, and to forestall a claim of incompetence of counsel, we also conclude that the error in failing to fully redact the tape of the officers' opinions that defendant was lying was necessarily harmless. Defendant was certainly lying to the officers and both in the second videotaped interview and at trial he admitted that he had done so. At trial he repeatedly admitted he had lied to the police and to the jury in his previous trials.[7] Neither officer was asked at trial to opine on defendant's veracity.

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[7] For example, defendant admitted on the stand that he had "lied about a lot of things"; he admitted having lied to this jury about having fed the children breakfast on the morning of Janika's death; he admitted having lied under oath at the prior trial when he testified he did not kick Shelton and that he had not knocked her down immediately before Janika's death. Defendant admitted having lied to the police officer at the taped interview about not having kicked Shelton. He admitted having lied to the officers about beating up on Shelton and knocking her down. He did so in order to protect himself and because he was scared. Defendant admitted having lied at the prior trial about whether he had told the officers he had kicked Shelton; he admitted that he had lied to protect himself and that he "[would] lie today to

(Continued on following page)

Given the overwhelming evidence that defendant had, in fact, lied repeatedly about the circumstances surrounding Janika's death in a myriad of respects, the officers' expressions of opinion in the taped interviews that they believed defendant was lying added little to the evidence the jury heard. It is not reasonably probable that their opinions during the interviews that defendant was lying prejudiced defendant or that redaction of their opinions from the tape would have led to a result more favorable to defendant. (*People v. Melton, supra,* 44 Cal.3d at p. 745; *People v. Smith, supra,* 214 Cal.App.3d at pp. 915-916.) Clearly, the error did not alter the outcome of the trial and, thus, does not warrant reversal. (Cal. Const., art. VI, § 13; Evid. Code, § 353.)

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protect [his] honor." Defendant admitted having lied to the police during the first videotaped interview about having stepped on Janika. He admitted lying to the officers when he told them he never hurt anybody before. He admitted lying to the police about the manner in which the child had been injured. He admitted lying to the police during the first interview tape when he demonstrated to the police officers that he lightly pushed on Janika's stomach as a form of CPR. He lied when he told the police he had called 911 and that he had called an ambulance, when in fact he had not called the ambulance and had told the other adults present not to call 911. At the current trial, defendant denied having had training in CPR. He was impeached by prior testimony and his admission that he was taught how to do CPR in high school. He admitted having lied to the police officers about the argument he had had with Shelton that led to his beating her up, telling them it was over gas for the car and diapers, when in fact the argument was over his mistreatment of Janika. He admitted he had not testified truthfully at the prior trial about a previous occasion when Janika became unconscious while alone in his care, when he testified that the door to the room they were in was locked because a friend had locked it upon leaving. In fact the door could only be locked from the inside.

III.

Impeachment of Jennifer Shelton

Defendant contends that the trial court erred in allowing testimony by Shelton that defendant had physically assaulted her "frequently" – on average once a week – during the six to seven months of their relationship. In our prior opinion in this appeal, we concluded that admission of this testimony was error, reasoning: "Defendant moved to exclude testimony by Jennifer Shelton as to his prior acts of domestic violence on her because the current trial pertained only to the death of Janika Price. He was convicted in the prior trial of battery on Jennifer Shelton based on the beating he inflicted immediately before Janika's death. The trial court, however, ruled that the evidence of prior abuse would be admissible to explain why Shelton changed her testimony between the preliminary examination and the first two trials.

"Shelton testified on direct examination at the current trial as follows: [Defendant] had physically assaulted her about once a week during the six or seven months they lived together. When she testified at the preliminary examination, her testimony, which was supportive of [defendant], was not totally truthful because she did not believe that [defendant] could do something that 'hateful.' She further testified that [defendant] had a 'temper.'

"[Defendant] correctly contends that this evidence was inadmissible on the ground stated. Reference to Shelton's preliminary hearing testimony was inadmissible hearsay. It was not admissible under Evidence Code section 1235 as a prior inconsistent statement because there was no inconsistency. Shelton admitted in her testimony at the current trial that her preliminary hearing testimony was

false. Thus, it would only have been admissible as a prior consistent statement under Evidence Code section 1236 if her credibility had been challenged, which it had not. (Evid. Code, §§ 1236, 791.) It was improper bootstrapping to introduce the otherwise inadmissible history of domestic violence for the purpose of explaining Shelton's preliminary hearing testimony which was inadmissible and irrelevant." (*People v. Johnson, supra,* A085450, typed opn. at p. 26.)

Although we have concluded this evidence was erroneously admitted, defendant has failed to demonstrate prejudice in the circumstances presented here. Shelton's testimony about past abuse was brief and without details. In contrast, properly admitted evidence of defendant's abuse of Shelton immediately before he killed Janika was graphically detailed and showed considerable brutality by defendant. That beating resulted from their argument over defendant's mistreatment of Janika and culminated in his kicking Shelton, knocking her down and kicking her again while she lay on the floor. The risk that the jury would conclude that defendant "was a bad man, and that he beat Janika in the same way that he beat her mother," was far more likely attributable to that detailed and graphic evidence than to Shelton's brief and general testimony that defendant had frequently abused her in the past.

Although the court allowed the jury to rely on the unspecified abuse as misdemeanor conduct bearing upon defendant's credibility as permitted by *People v. Wheeler* (1992) 4 Cal.4th 284, 290, that use of this evidence also paled in significance in light of evidence of defendant's *felony* conviction, which was properly admitted, and of his numerous admitted lies.

On the record here, we are convinced that it is not reasonably probable that exclusion of Shelton's testimony that defendant had repeatedly abused her in the past would have led to a result more favorable to defendant.

IV.

Testimony of Tammy Keller

We next address the prejudicial impact of the trial court's erroneous admission of evidence regarding defendant's trashing of his ex-wife's apartment two and one-half years before he killed Janika. We described the evidence and our conclusion that its admission was erroneous in our prior opinion in this appeal as follows:

"[Defendant] contends that the court erred in allowing Tammy Keller to testify on rebuttal about his trashing his ex-wife's apartment. Keller was the cousin of [defendant's] ex-wife, Holly Eastman, who was the mother of [defendant's] two sons. She testified that she was living with Holly and her two children on August 27, 1993, when [defendant] came over while Holly was not there. [Defendant] spoke to Holly on the telephone and argued with her. After that, [defendant] went on a rampage. He ripped the telephone out of the wall and urinated on the dirty dishes in the kitchen sink. [Defendant] picked up his son and carried him under his arm. He threw a fish tank through the window, broke the glass coffee table, and tried to throw the television through the window. During the course of this, [defendant] accidentally bumped the child's head on the door and on the television.

"The trial court ruled that Keller's testimony was admissible to impeach [defendant's] testimony that '[my

two boys] knew I'm not going to let nothing happen to them. Any time they with they daddy, they know they're protected.' We agree with [defendant] that the evidence should have been excluded under Evidence Code sections 352 and 1101 in that its minor probative value was far outweighed by the prejudicial effect." (*People v. Johnson, supra,* A085450, typed opn. at pp. 27-28.)

Nevertheless, in light of the record as a whole, we believe the admission of this evidence did not result in a miscarriage of justice requiring reversal of the judgment.

As a threshold matter, we address the Attorney General's claim that defendant waived any error. Defense counsel successfully objected to the admission of all evidence concerning this incident during the prosecution's case-in-chief. He also argued against it's introduction on rebuttal, contending that defendant did not "open the door" by his assertion that his sons knew they were protected when they were with him. Defense counsel further argued that, "[s]hould the court conclude [defendant] did open the door, . . . this information should be limited as to what can come in. . . . " He urged the court to "limit it . . . to the accounts or narrations concerning the child and not all of the other extraneous [Evidence Code section] 352 issues such as what Ms. Keller did to try and get the child back, being dragged down the road, because that defeats the purpose of this evidence being introduced in the first place. [¶] . . . [I]t's being introduced or asked to be introduced as it relates to the child and not Ms. Keller." The court agreed, ruling that the testimony would be limited "to testimony relating to what happened to the child." It ruled that Keller "can testify as to what happened to the child. She may not testify as to assaultive behavior as to her or her holding onto the car as he's

driving away." In light of this ruling, it appears that counsel should have objected again when the prosecutor elicited evidence of events at the apartment before defendant actually grabbed his son. Nevertheless, it appears the parties understood the ruling to mean that evidence up to the point of Keller's chasing the car was to be admitted. In any event, we need not determine whether counsel waived objection to testimony as we have determined, in light of the entire record, that admission of Keller's testimony does not require reversal.

We have concluded that introduction of the entire version of what happened at the Keller apartment was error under Evidence Code sections 352 and 1101, because it was more prejudicial than probative. As recognized by the trial court when it refused to allow this evidence to be presented in the prosecutor's case-in-chief, such evidence is generally very prejudicial. Nevertheless, admission of a more limited version of this testimony would have been proper. Defendant admitted that he had "accidentally stepped on" his kids when they were underfoot. Asked how many times this had happened, he testified: "I don't know. Bumped into 'em a couple of times. I turn around and if I'm going out the door and I turn back around, they're right there on me trying to follow me. I mean, ain't like I did it on purpose or nothing. I just turned around." Keller's rebuttal testimony that defendant had come to her home where his sons were sleeping, and in an angry state grabbed his oldest son and "carried him like a football with his head in the front," "knocked [the child's] head into the door frame" while trying to pass from the bedroom into the living room where he tried to throw the television set through the window, once again hitting the boy's head with the television at which point the boy stopped crying

and closed his eyes, would have sufficed to rebut defendant's testimony without including the more inflammatory parts of the incident.

Immediately following Keller's testimony, the trial court read the following admonition: "[Y]ou just heard testimony with regard to the Defendant's treatment of his own children. That is being received to rebut his testimony with regard to his behavior toward his own children. All of this type of evidence . . . is not being received to show the Defendant is a person of bad character or has a propensity to commit crimes. It may be considered for the limited purposes for which it was received and no other purposes.

The jury was also instructed that other crimes evidence "may not be considered by you to prove that the Defendant is a person of bad character or that he has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show: [¶] . . . [¶] Acts of violence toward his own children, including the testimony of Ms. Keller regarding [defendant's older son] to rebut the Defendant's testimony regarding his behavior toward his own children. [¶] For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in this case. You are not to consider [it] for any other purpose."

The sole instance cited by defendant of the prosecutor referring to Keller's testimony during argument is in the context of the prosecutor's pointing out defendant's numerous lies: "It's a lie, just like the lie he told about his kids. 'My kids know I would never hurt them.' Really? Taking your kid and tossing him around and smacking his head, tossing up a television and knocking a kid in the

head." This brief and limited reference to Keller's testimony stayed well within the limits of that evidence, which we have concluded would have properly been admissible on rebuttal. Although defendant argues the prosecutor did not tell the jury they should limit this evidence to credibility, and should not use it to judge defendant's character, the prosecutor was not required to do so. The judge twice had instructed the jury that it must limit its consideration of the testimony "to rebut [his] testimony regarding his behavior toward his own children" and not to show him to be a person of bad character. The prosecutor properly limited his reference to Keller's testimony to challenge defendant's credibility regarding his treatment of his children.

Defendant has failed to prove that admission of this testimony resulted in a miscarriage of justice or that it was reasonably probable that but for its admission he would have received a more favorable result (*People v. Watson* (1956) 46 Cal.2d 818, 836), given that some limited testimony regarding this incident and defendant's knocking of his son's head against the door frame and against the television set as he tried to throw it out the window properly could have been admitted, that the jury was twice admonished that it could properly consider the evidence only to rebut defendant's testimony about his treatment of his own children, and that the prosecutor limited his use of the evidence to that which was properly admissible.

The strong forensic evidence that Janika was killed by an intentional and forceful blow to the chest, that she was the victim of child abuse, that the blow could not have been from defendant's accidentally stepping on her or from CPR, combined with other evidence of defendant's explosive violence toward Shelton on the night in question and

as to his abusive treatment of Janika on other occasions, combined with his complete lack of credibility and the repeated impeachment of his version of events on the evening Janika was killed, taken together provide overwhelming evidence that defendant killed Janika with malice by an intentional blow to her chest. Admission of the Keller testimony as to the details his 1993 "rampage" was harmless error.

V.

The BB Gun Experiment

In our prior opinion in this appeal, we agreed with defendant's contention that the trial court erred "in allowing [O]fficer Krastof to testify that the bruise marks on Janika's face appeared similar to the marks caused by shooting a fellow officer with a BB gun." We reasoned: "A witness may not give expert testimony on an experiment without a showing that the witness has the necessary expertise. 'The proponent of experimental evidence bears the burden of production and proof on the question whether such evidence rests on an adequate foundation.' (*People v. Bonin* (1989) 47 Cal.3d 808, 847.) 'Admission of such evidence depends upon proof of the following foundational items: (1) The experiment must be relevant; (2) it must have been conducted under at least substantially similar, although not necessarily absolutely identical, conditions as those of the actual occurrence; (3) the qualifications of the individual testifying concerning the experimentation must be demonstrated with some particularity; and (4) evidence of the experiment will not consume undue time, confuse the issues, or mislead the jury.' (*People v. Turner* [(1994)] 8 Cal.4th [137,] 198.) [¶] Here, there was no showing that [O]fficer Krastof had any

training, experience, or expertise regarding BB gun strike marks. Nor was there any showing of expertise to qualify him to given [sic] an opinion on whether an injury on an adult's arm resembles another injury on a child's face." (*People v. Johnson, supra,* A085450, typed opn. at pp. 28-29.)

Defense counsel objected to this evidence initially on grounds of lack of foundation. The court *sustained* the objection. The district attorney purported to lay the foundation for the officer's opinion by asking Krastof how he had tested the gun. Defense counsel *did not object* that the foundation was insufficient. Rather, after the lunch break, defense counsel moved for a mistrial "on prosecutorial misconduct, specifically, failure to provide discovery" about the BB gun test and the comparison with the bruising on Janika's face. The district attorney contended the information had been provided to defense counsel in discovery. After checking, defense counsel conceded, "Mr. Brown is correct in that it is in the police report" and that the police report was provided to him. Defense counsel did not withdraw his mistrial motion, but put it "on delay until Dr. Peterson's testimony" if it turned out that, unbeknownst to the defense, photographs of the injuries had been provided to Dr. Peterson and he concurred with Krastof's analysis. The court suggested defense counsel talk to Dr. Peterson and determine "if he wishes to renew the motion." The court concluded: "Right now I'll show it this way, Mr. Cannon: The motion is withdrawn unless you reraise it with me." Defense counsel responded: "That's a fine characterization." Counsel failed to object to the adequacy of the foundation as purported to be laid, thus waiving that objection, and in effect withdrew and never

renewed his motion for mistrial. Defendant has waived the error.

In order to forestall a claim of ineffective assistance of counsel, we address the issue of prejudice. Had the issue been properly preserved, defendant has failed to show prejudice. Defendant argues only that the "evidence of the supposed BB injury was so powerful. For this evidence would clearly cause the jury to believe that if [defendant] was a bad enough man to shoot the child with a BB gun, then surely he was a bad enough man to murder her." There was no assertion by the prosecution that *defendant* had shot Janika with a BB gun, and Dr. Peterson did not speculate that any of the bruises he identified could have come from a BB gun. He did not even say that the facial bruises could have been suffered on the night in question. The prosecutor never referred to this testimony in his closing argument. Krastof never held himself out as an expert in this area, and there is no reason to believe the jury gave the testimony undue weight. As for defendant's claim that the jury could use this evidence to speculate that defendant was "a bad enough man to murder [Janika]," Dr. Peterson's expert testimony that the child had been the victim of child abuse, the evidence concerning defendant's punching Janika in the stomach, and Shelton's testimony regarding defendant's treatment of Janika would have been far more powerful on that point.

Viewing the record as a whole, defendant has failed to show that, but for the erroneous admission of Krastof's testimony that the bruises on Janika's face looked similar to those made by the BB gun on the other officer's arm, he would have received a more favorable result at trial. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

VI.

Cumulative Error Claim

Finally, defendant contends that the cumulative effect of the trial court's errors requires reversal of the judgment. Based on our review of the entire record, defendant's contention fails. We have reviewed defendant's claims both individually and collectively. Even when we consider the few instances of error together, we remain convinced beyond a reasonable doubt that they had no bearing on the outcome and did not render defendant's trial fundamentally unfair. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Defendant was entitled to a trial "in which his guilt or innocence was fairly adjudicated." (*People v. Hill* (1998) 17 Cal.4th 800, 844.) He received such a trial. Unlike *People v. Hill,* in which "outrageous and pervasive misconduct" by the prosecutor led the court to reverse the judgment in a trial that was "rife with serious error" (*id.* at p. 815), we have found no instance of prosecutorial misconduct. Nor can we say the current trial in this case was "rife with serious error."

Disposition

The judgment is affirmed. The petition for writ of habeas corpus is denied.

Kline, P.J.

We concur:

Haerle, J.

Lambden, J.

Court of Appeal, First Appellate District, Division Two – Nos. A085450/A106431

S127602

IN THE SUPREME COURT OF CALIFORNIA

En Banc

(Filed Oct. 20, 2004)

THE PEOPLE, Plaintiff and Respondent,

v.

JAY SHAWN JOHNSON, Defendant and Appellant.

Petition for review DENIED.

Kennard, J., is of the opinion the petition should be granted.

Werdegar, J., was absent and did not participate.

/s/ George
Chief Justice

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

January 7, 2005

Mr. Stephen B. Bedrick
1970 Broadway
Suite 1200
Oakland, CA 94612

Re: Jay Shawn Johnson
v. California
No. 04-6964

Dear Mr. Bedrick:

The Court today entered the following order in the above entitled case:

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari is granted.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

(8)

No. 04-6964

In The

Supreme Court of the United States

JAY SHAWN JOHNSON,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of California

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether to establish a *prima facie* case under *Batson v. Kentucky*, 476 U.S. 79 (1986), the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias?

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OPINIONS BELOW

The decision of the California Supreme Court, 30 Cal.4th 1302, 1 Cal.Rptr.3d 1, 71 P.3d 270 (2003), is at p. 114 of the Joint Appendix (Jt. App.). The first decision of the California Court of Appeal, 88 Cal.App.4th 318, 105 Cal.Rptr.2d 717 (1st App. Dist. 2001), is at Jt. App. 59. The second decision of the California Court of Appeal, after this Court dismissed the prior case for lack of jurisdiction, is at Jt. App. 179. The subsequent order by the California Supreme Court, denying review is at Jt. App. 215. The decisions of the trial court, contained in oral remarks from the bench, are at Jt. App. 4-11.

JURISDICTION

Jurisdiction arises under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment states in pertinent part, "Nor shall any state ... deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Nature of the Alleged Offense

Petitioner Jay Shawn Johnson was convicted in 1998 of second degree murder, California Penal Code § 187, and assault on child, resulting in death, Calif. Penal Code § 2.3ab. Petitioner, an African-American (black) man, caused the death of Janika Price, the 18-month old daughter of his white girlfriend and another man. The issue at trial was whether the homicide was accidental or malicious.

The prosecution theory was that Petitioner maliciously punched or kicked the child while she was in the

bedroom of their home. As part of his circumstantial evidence case, the prosecutor relied upon a quantity of bad character evidence, some of which the Court of Appeal found inadmissible. (Jt. App. 88-97, 201-214) The defense theory was that the death was accidental. Petitioner admitted causing the child's death. He bumped her with his foot while he and his two young sons were moving about the bedroom. The child started wheezing and had trouble breathing. The child's mother took the child into the next room. Petitioner gave the child some water. She drank it. When she gasped for breath, Petitioner attempted to perform cardio-pulmonary resuscitation (CPR) by striking the child hard on the chest, but he struck too hard. Petitioner defended on the ground that his negligent administration of CPR was the cause of death.[1]

Litigation of The *Batson* Issues In The Courts Below

California usually, as here, impanels a jury in the following manner: From among the pool of prospective jurors, 12 are seated in the jury box. The prosecution and defense are provided with copies of written questionnaires completed by the jurors. After the prospective jurors have been questioned, the trial judge hears and decides any challenges for cause. If jurors are disqualified for cause, their seats are refilled, and the replacements are similarly questioned and challenged for cause. Then the prosecution or defense may exercise peremptory challenges. If less than 12 jurors remain, additional jurors are seated to bring the total to 12. After questioning and challenges for cause, either side may exercise peremptory challenges

[1] This conviction was after a third trial. The first trial terminated in a mistrial. The second trial resulted in a conviction, but it was reversed in case #A076360, unpublished opinion filed July 27, 1998, for instructional errors regarding concurrent cause.

against the newly called prospective jurors or those who were called earlier. This process continues until both sides accept 12 jurors and some alternates (here, three).

In the instant case, 43 jurors were passed for cause. Three (3) were African-American (black). The prosecution peremptorily challenged all three of the black jurors, and nine of the 40 non-black jurors, for a total of 12. The defense peremptorily challenged 16 prospective jurors. (Jt. App. 13) The resulting jury, including alternates, was all white (with one Spanish-surnamed person).

The prosecutor exercised his 4th peremptory challenge against Clodette Turner and his 8th peremptory against Sara Edwards, who were both black. He challenged Ms. Edwards immediately after the trial court voir dired her. Defense counsel then objected[2] on the ground that these peremptory challenges had been made on the basis of race.[3] The prosecutor did not respond to this objection or volunteer any explanation of these challenges.

The trial court rejected this first challenge on the ground that there had not "been shown a strong likelihood that the exercise of the peremptory challenges" had been based on race. The trial court, however, expressly admonished the prosecutor "that we are very close." (Jt. App. 6)

Notwithstanding that admonition, the prosecutor exercised his 12th and final peremptory challenge to remove the third and last black prospective juror, Ruby Lanere, immediately after her voir dire concluded. The

[2] Defense counsel cited *People v. Wheeler*, 22 Cal.3d 258 (1979), the California equivalent of *Batson*. This was sufficient to raise a *Batson* claim. *Ford v. Georgia*, 498 U.S. 411, 418-19, 112 L.Ed.2d 935, 111 S.Ct. 850 (1991).

[3] There was brief confusion as to whether a third juror, Bernice Lafall, was African-American. The parties agreed she was Indian. She was dropped from the *Wheeler/Batson* motion.

defense renewed its objection, noting that the prosecutor had now removed all three black jurors who had been passed for cause. The defense contended that "the exercise of the peremptory challenges in this way showed or reflected a systematic attempt by the prosecution to exclude African-Americans from this jury panel." (Jt. App. 7-8) Again, the prosecutor did not offer explanations.

The trial court declined to "make a *prima facie* finding." (Jt. App. 8-11) Its ruling focused on whether the peremptory challenges were "justified." Although the prosecutor had not offered any explanation for his challenge to Ms. Lanere, the trial court commented on Ms. Lanere's written questionnaire and verbal responses, and concluded those responses "would have justified a peremptory challenge." (Jt. App. 9)[4] Similarly, although the prosecutor had not explained his earlier challenge to Ms. Edwards, the trial court commented on Ms. Edwards' questionnaire and statements in court.[5] It concluded, "[w]ith regard to Ms. Edwards, the Court felt there was sufficient reason . . . to justify the exercise of the peremptory challenge." (Jt. App. 10)

Neither the prosecutor nor the trial court said anything about the third black juror, Ms. Turner. The trial court then asked the prosecutor if he "wish[ed] to make a further record." He declined. (Jt. App. 11)

[4] The trial court articulated two possible justifications for the challenge against Ms. Lanere: (1) she had a sister who had been arrested on drug charges, and (2) her answers indicated that she had difficulty understanding some of the questions. (Jt. App. 8-9)

[5] The trial judge noted two possible justifications for a peremptory challenge to Ms. Edwards: (1) her questionnaire had failed to mention that thirty years earlier "a parent had a robbery or arrest" and (2) she expressed concern about whether she could be fair in a child abuse case, indicating an inclination to favor the prosecution. (Jt. App. 10)

Although at trial, the prosecutor carefully avoided explaining his challenges, at the California Court of Appeal the state's appellate counsel was quite effusive. The state's brief identified numerous "grounds upon which the prosecutor *might reasonably* have challenged" the jurors in question, although there were no assertions about what the prosecutor's actual motives were two years earlier.[6]

The state's appellate brief identified two supposed "permissible reason[s]" or "race-neutral justifications" for objecting to prospective juror Clodette Turner,[7] five supposed permissible reasons for challenging Sara Edwards,[8] and eight supposed permissible reasons for challenging Ruby Lanere.[9] The state did not, however, actually assert

[6] Respondent's Brief, *People v. Johnson*, California Court of Appeal, No. A085450, 1st Dist., Div. 2, p. 40 (emphasis added).

[7] (1) Clodette Turner "neglected to answer questions 57 and 58 on the questionnaire, which inquired as to her views on prosecutors and defense attorneys. . . . The mistaken failure to complete the questionnaire betrays an 'inattention to detail' that justifies the exercise of a peremptory challenge." (2) Because she was childless, "the district attorney reasonably could have feared that she would be insufficiently sympathetic to the victim – a 19-month old child." (*Id.* at 40).

[8] (1) Sara Edwards was "uncertain whether she could be 'fair and impartial,' given the nature of the charges . . . [she] confessed that she had 'no feelings one way or the other about sitting as a juror until I found out who the victim was. I am *deeply* saddened that it was an eighteen month old child.' " (emphasis in original) (2) "[Edwards] was evasive. She did not answer question 30 on the questionnaire. . . . " (3) "[T]he juror's parent had been arrested for robbery over 35 years ago. . . . The arrest of a close relative is an acceptable race-neutral justification for a peremptory challenge." (4) "Race-neutral justifications for excusing [Edwards] are apparent from her questionnaire and her voir dire. She . . . was childless." (5) "She . . . had had 'legal training' or had taken a law course. . . . Legal training is a legitimate, race-neutral ground." (*Id.* at 41-42).

[9] (1) Ruby Lanere "ha[d] a sister who had been arrested." (2) "[S]he . . . [had] a son close in age to [Johnson]." (3) "She stated that she could

(Continued on following page)

(or deny) that any of the 15 recited "permissible reasons" constituted the prosecutor's actual motive at trial. Moreover, several such "permissible reasons," if anything, suggested possible bias in favor of the state. A prosecution challenge on such basis is rather unlikely.

A divided state Court of Appeal ruled by a vote of 2-1 that Johnson had established a *prima facie* case under *Batson*, and reversed his conviction[10] relying on several factors: (i) The prosecutor peremptorily challenged all three black potential jurors. (ii) The trial court erred when it stated that the standard for a *prima facie* case was a "strong likelihood" of discrimination. Instead, the correct test is the less stringent standard of an "inference" of discrimination under *Batson*. Because the trial court applied an incorrect legal standard, its ruling was not entitled to deference, and the Court of Appeal could review the issue *de novo*. (iii) There was no race-neutral reason on

not follow the instructions." (4) "Like [Edwards], she did not know whether she could be fair, given the nature of the charges. . . . " (Edwards indicated she was biased in favor of the prosecution because the victim was an eighteen month old child.) (5) "Her ability was also compromised . . . by her knowledge that she or a family member or close friend had been the victim of a crime where the suspect was African-American." (6) "Evidence of domestic abuse, she continued, also would affect her impartiality." (Johnson had been convicted of abusing the girlfriend who was the mother of the victim. Any resulting bias by this juror would have been *in favor of* the prosecution.) (7) Her ability to be fair, she admitted, was affected by "the issue of interracial relationships – 'interracial relations is different. . . . ' What affected her ability to be impartial, in other words, was the 'he is Black and she is not.' Opinions on racial issues, too, are race-neutral justifications for a challenge." (8) "[T]he juror's poor command of the language and potential difficulty understanding the proceedings. . . . " (*Id.* at 42-43).

[10] In California, when a trial court erroneously fails to find a *prima facie* case under *Batson*, the remedy is reversal. *People v. Fuentes* (1991) 54 Cal.3d 707, 721 [286 Cal.Rptr. 792, 812 P.2d 75]; *People v. Snow* (1987) 44 Cal.3d 216, 226-227 [242 Cal.Rptr. 477, 746 P.2d 452].

the record why two of the three black jurors, Clodette Turner and Sara Edwards, would not be suitable. (iv) The supposed reasons why the prosecutor challenged them were pretextual. Those same reasons applied to several white jurors whom the prosecutor accepted.[11] (Jt. App. 59-88)

The California Supreme Court, by a vote of 5-2, reversed the Court of Appeal, and affirmed the trial court decision that Johnson had not established a *prima facie Batson* case. The majority held: (i) To establish a *prima facie* case under *Batson*, a party must demonstrate "that it is more likely than not that the other party's peremptory challenges, if unexplained, were based on impermissible group bias." *People v. Johnson*, 30 Cal.4th at 1306. (Jt. App. 116) (ii) Where a trial judge, relying on such a standard, has concluded that there was no *prima facie* case, affirmance on appeal is required "if the record *suggests* grounds on which the prosecutor *might reasonably have* challenged the jurors." *Id.*, 30 Cal.4th at 1325. (Jt. App. 197, emphasis added) (iii) A defendant is barred from arguing on appeal that the grounds claimed to have been relied upon by the prosecutor were pretextual, because those claimed grounds equally apply to white jurors who were accepted. *Id.*, 30 Cal.4th at 1318-1324. (Jt. App. 116, 135)

Two of the seven California Supreme Court justices dissented. They maintained that to establish a *prima facie* case an objector need only identify evidence which would *permit* an inference of discrimination. Such a *prima facie* case was established here, because the prosecutor peremptied all three black jurors, and because, for two of those

[11] The Court of Appeal also concluded that the trial court had erred in admitting certain highly prejudicial prosecution evidence, but it did not overturn the conviction on that basis. (Jt. App. 88-97)

jurors, there is nothing on the record showing why they would not be acceptable. *People v. Johnson*, 30 Cal.4th at 1333, 1340, 1341. (Jt. App. 152-153, 159, 171-172)

Last term, on December 1, 2003 this Court granted certiorari. *Johnson v. California*, case No. 03-6539. However, on May 3, 2004, after oral argument, this Court dismissed the case, due to the lack of a final state court judgment. *Johnson v. California*, ___ U.S. ___, 124 S.Ct. 1833 (2004). (Jt. App. 174) On August 5, 2004 the state Court of Appeal decided the remaining issues and affirmed Petitioner's conviction. (Jt. App. 179) On October 20, 2004 the California Supreme Court denied discretionary review. (Jt. App. 215) On January 10, 2005 this Court granted certiorari again. (Jt. App. 216)

SUMMARY OF ARGUMENT

(1) California's test for a *prima facie* case of racial discrimination in jury selection under *Batson v. Kentucky*, 476 U.S. 79 (1986), requires a much higher level of proof of discrimination at the *prima facie* stage than does *Batson*. California requires proof at the *prima facie* stage that discrimination was "more likely than not," meaning proof by a preponderance of the evidence that discrimination occurred. *Batson* merely requires that an objector "raise an inference" of discrimination. 476 U.S. at 96. California's test is inconsistent with *Batson* for many reasons:

(a) California's requirement that an objector prove discriminatory motive by a preponderance of the evidence at the *prima facie* stage requires proof on the merits in order to establish a *prima facie* case. That undermines the whole meaning of *prima facie* case, which is to make a preliminary showing, and to impose a burden less demanding than proving the merits of the case.

(b) The California test confuses the *prima facie* stage and the merits stage of a *Batson* analysis when it requires the objector, at what should be the *prima facie* stage, to prove that discrimination was "more likely than not." This requirement of merits-level proof at the preliminary stage is premature and improper. At that stage, the objector does not have the critical evidence needed to prove his case on the merits, namely, the prosecutor's proffered reasons for the disputed challenges. This is like requiring a civil plaintiff to prove his case without discovery.

(c) The conflation of the first and third steps of *Batson* analysis violates the rule of *Purkett v. Elem*, 515 U.S. 765 (1995) that the *Batson* steps must be considered separately.

(d) The court below claimed that its *prima facie* test is consistent with this Court's test for a *prima facie* case in Title VII employment cases. That court is incorrect. (i) A Title VII plaintiff need not show that discrimination is more likely than not to create a *prima facie* case. (ii) The threshold for a *prima facie Batson* violation should be lower than that for a *prima facie* Title VII violation.

(2) The correct test for a *prima facie* case of discrimination under *Batson* is to identify sufficient evidence in the record to *permit* a finding that the other party's peremptory challenges, if unexplained, were based on impermissible group bias. This evidentiary standard is generally referred to as a permissive inference.

The purpose of a *prima facie* case under *Batson* is to help courts and parties answer, not to improperly evade, the ultimate question of discrimination. That purpose will only be satisfied when the objector and the trial court can learn the reasons behind the challenges to the minority jurors whenever there is sufficient evidence to permit an inference of discrimination. *Batson*'s traditional permissive inference standard assures such inquiry.

The federal and state courts utilize a permissive inference threshold in interpreting and enforcing *Batson*. Under this standard, the federal courts regularly find a *prima facie* case whenever (a) a party peremptorily challenges all of two or more members of a protected group, or (b) whenever a party challenges two or more members of a protected group, and thereby challenges a majority of that group.

(3) On appeal, in litigating the denial of a *prima facie* case, the California court erroneously allows the state to speculate as to "possible" reasons for the prosecutor's challenges, even though he never stated his actual reasons. Such speculation is improper. As Judge Kozinski held in *Paulino v. Castro*, 371 F.3d 1083, 1090 (9th Cir. 2004), it does not matter that the prosecutor might have had good reasons; what matters were his actual reasons. Further, the state court compounds this error by one-sidedly prohibiting the defense from rebutting such hypothesized reasons by showing pretext by pointing to evidence regarding comparable jurors of another race who were not challenged.

(4) The Court should find a *prima facie Batson* violation here. The prosecutor challenged all three African-American jurors, and caused a black defendant, charged with killing his white girlfriend's child, to be tried by an all-white jury. The prosecutor did not articulate his actual reasons for these challenges. The reasons hypothesized for the challenges to two of the black jurors were manifestly pretextual, because they equally applied to several accepted white jurors.

ARGUMENT

I. THE CORRECT TEST FOR A *PRIMA FACIE* CASE OF DISCRIMINATION IN JURY SELECTION IS WHETHER THE EVIDENCE WOULD PERMIT AN INFERENCE OF DISCRIMINATION, NOT CALIFORNIA'S REQUIREMENT THAT THE OBJECTOR MUST PROVE THAT THE EXISTENCE OF A DISCRIMINATORY MOTIVE WAS "MORE LIKELY THAN NOT"

A. *Batson* Has Established a Method for Identifying and Prohibiting Racial Discrimination in Jury Selection

In *Batson v. Kentucky*, 476 U.S. 79, 90 L.Ed.2d 69, 106 S.Ct. 1712 (1986), the Court held that a party may prevent racial discrimination in jury selection based on proof that discrimination was occurring in his own trial.

Batson review was designed to serve multiple ends. (i) One purpose is "to protect individual defendants from discrimination in the selection of jurors." *Powers v. Ohio*, 489 U.S. 400, 406, 113 L.Ed.2d 411, 111 S.Ct. 1364 (1991) (*Batson* applies to a white defendant). (ii) A second purpose is to enforce the equal protection rights of the jurors themselves. Denial of participation in jury service because of race discriminates against the juror personally. While "[a]n individual juror does not have a right to sit on any particular petit jury, . . . he or she does possess the right not to be excluded from one on account of race." *Georgia v. McCollum*, 505 U.S. 42, 49, 120 L.Ed.2d 33, 112 S.Ct. 2348 (1992) (*Batson* applies to challenges by criminal defendants); *Powers*, 499 U.S. at 409. The harm from such exclusion is manifest. The juror is subjected to open and public racial discrimination. (iii) Third, discriminatory

challenges undermine public confidence in the fairness of the jury trial system. *Georgia v. McCollum*, *supra*, 505 U.S. at 49.

Batson and its progeny established a three-step test for evaluating a charge of racial discrimination in jury selection. (1) First, the objector must present a *prima facie* case of discrimination. He presents a *prima facie* case by showing that the circumstances "raise an inference" of discrimination. *Id.*, 479 U.S. at 93-96.[12] In *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029 (2003) the Court explained that the "inference" of discrimination needed for a *prima facie* case could be shown by statistics, such as where the prosecutor challenged a disproportionate number of minority jurors. (2) Second, if a *prima facie* case is established, the prosecutor must state the reason for his challenge, and the court must determine if the reason is race-neutral on its face. (3) Third, the trial court determines whether or not the challenge is based on impermissible group bias. *Purkett v. Elem*, 514 U.S. 765, 767, 131 L.Ed.2d 834, 115 S.Ct. 1769 (1995).

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[12] *Batson* illustrated how to show "inference," 476 U.S. at 97:

> [T]he trial court should consider all relevant circumstances. For example, a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during voir dire examination and in exercising the challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative. We have confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning a prosecutor's use of peremptory challenges create a prima facie case of discrimination against black jurors.

B. When California Requires the Objector at the *Prima Facie* Stage to Prove by a Preponderance of the Evidence That a Challenge Was Made for a Discriminatory Purpose, It Improperly Applies a Merits Test at the *Prima Facie* Stage

The court below ruled that a *prima facie Batson* case can only be established by persuading the trial court to find that the record at the *prima facie* stage actually establishes discrimination on the merits. It held:

> to state a *prima facie* case, the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based upon impermissible group bias.

People v. Johnson, 30 Cal.4th at 1306. (Jt. App. 116) This test undermines the whole meaning of a *prima facie* case, which is to make a preliminary showing, not a merits showing. See, e.g., *Ulster County Court v. Allen*, 442 U.S. 140, 156, 60 L.Ed.2d 777, 99 S.Ct. 2213 (1979).

When the California court held that the objector must show, at the *prima facie* stage, that discrimination is "more likely than not," it meant: prove that discrimination occurred. Its "more likely than not" test means the objector must show discrimination by the "preponderance of the evidence." *People v. Johnson*, 30 Cal.4th at 1317 (Jt. App. 133-134) That is, of course, the traditional standard of proof on the merits. Thus, under the California test, what must be proved at the *prima facie* stage is the existence of discrimination in jury selection – on the merits. Further, under the California test, the objector must make this merits-like showing without knowing, and without any

opportunity to attack as pretextual, whatever reasons might be offered for the challenges.[13]

Under the California standard, an objector must twice persuade the trial court, by a preponderance of the evidence, to make findings of discrimination. First, he must do so at step one, the supposed *prima facie* stage, *before* any reasons have been given for the peremptory challenges, and when the record is thus incomplete, and without being able to attack as pretextual whatever reasons might be offered for the challenges. Second, if the court makes a *prima facie* finding, and after reasons are given, the objector must again persuade the court to make the same finding, namely, that discrimination occurred.

Thus, the California test undermines the meaning of a *prima facie Batson* case, when it requires the objector to satisfy the same burden of proof at the *prima facie* stage (step one), before he has heard the challenger's reasons, as he must meet at the merits stage (step three), after he has heard the challenger's reasons.

In *Purkett v. Elem*, 514 U.S. 767, the Court clarified *Batson*'s three-step test for determining when peremptory challenges violate the equal protection clause:

> [O]nce the opponent of a peremptory challenge has made out a *prima facie* case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the

[13] California similarly requires the objector at the *prima facie* stage to establish a "legally mandatory [but] rebuttable presumption" of group bias. *Id.*, 30 Cal.4th at 1315. (Jt. App. 130) This suggests the objector's evidence must be so overwhelming as to compel a finding of discrimination as a matter of law if no contrary evidence is presented. This is directly contrary to this Court's rule in *Purkett v. Elem*, *supra*.

> trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination. *Hernandez v. New York*, 500 U.S. 352, 358-359 (1991) (plurality opinion) *id.*, at 375 (O'Connor, J., concurring in judgment); *Batson, supra*, at 96-98.

This test requires separate analysis at each step. In *Purkett v. Elem* the Court reversed because the circuit court improperly conflated steps two and three. It conflated those steps when it required that the "justification tendered at the second step be not just neutral but also at least minimally persuasive, i.e. 'plausible.'" *Id.*, 514 U.S. at 768. That conflation was defective. It improperly required the prosecutor to show at step two not only that his reason was race-neutral (the step two requirement) but also that it was plausible and persuasive (the step three issue). Thus, the Court reversed in *Purkett v. Elem* because the circuit court required too much at step two.

An equivalent, or worse, problem arises under the California test for a *prima facie* case. That court requires the objector, in order to present a *prima facie* case, to prove at the first step that it was "more likely than not" that the prosecutor acted with discriminatory intent. That violates the *Purkett v. Elem* test in several ways.

(i) The requirement to prove discriminatory motive by a preponderance of the evidence at the *prima facie* stage requires the objector to prove his case on the merits in order to establish a *prima facie* case. That undermines the whole meaning of *prima facie* case, which is to make a preliminary showing. *Ulster County Court v. Allen, supra*.

(ii) Under *Purkett v. Elem*, the objector does not need to reach the level of proof of discrimination of "more likely than not" until step three. At that step the "trial court *then* will have the duty to determine if the defendant has established purposeful discrimination." *Batson*, 476 U.S.

at 98 (emphasis added). The California test is defective, because it improperly conflates steps one and three.

(iii) Worse, when the California *prima facie* test requires the objector, at step one, to make the step three showing – namely, prove that discrimination is "more likely than not" – it does so without allowing the objector to have access to the most important piece of information which the objector would ordinarily use at step three, namely, the prosecutor's purported reason.[14] See *Purkett v. Elem, supra*. At the *prima facie* case step, it would be rather difficult for an objector to prove that the reason for the prosecutor's challenge is "more likely than not" racially-based, if he has not yet been allowed to learn the prosecutor's claimed reason. Requiring an objector to prove at the first step that discrimination is "more likely than not," without knowing the prosecutor's reason, is like requiring a civil plaintiff to prove his case without the critical discovery.

In the large majority of federal *Batson* cases which have concluded that impermissible discrimination had occurred in jury selection, the pivotal evidence was almost invariably a demonstration that the articulated reason was pretextual: (a) that the articulated reasons rested on an inaccurate description of the excluded juror, (b) that the reasons were inconsistent with the action of the prosecutor in not challenging other similar jurors of a different race,

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[14] As Justice Kennard correctly noted in her dissenting opinion, 30 Cal.4th at 1339 (Jt. App. 170):

> The threshold for establishing a prima facie case should be relatively low, so that close cases are not decided at the first stage of the inquiry, but only after the trial judge has heard the prosecutor's explanations and is in a better position to determine the propriety of the challenges . . . [T]he prosecutor's explanation is often critical to the decision whether the challenge was proper."

(c) that the reason was inherently implausible, (d) that the reason given was a proxy for race, or (e) that the prosecutor had articulated several different explanations, and the falsity of one account called into question the credibility of the others.[15] See also *Miller-El v. Cockrell*, *supra*, 537 U.S. 322, 123 S.Ct. at 1043, where the Court critically noted that "three of the state's proffered race-neutral rationales for striking African-Americans pertained just as well to some white jurors who were not challenged."

[15] See, e.g., *Ford v. Norris*, 67 F.3d 162, 168-169 (8th Cir. 1995) (prosecutor's answer that he struck a juror because he supposedly was "illiterate" was held pretextual, because the juror's answer that he does not "read the paper," but watches television instead, did not support the claim of illiteracy); *McClain v. Prunty*, 217 F.3d 1209, 1221 (9th Cir. 2000) (prosecutor claimed he challenged black juror because juror said she mistrusted the system, but record did not contain any such statement); *Johnson v. Vasquez*, 3 F.3d 1327, 1330 (9th Cir. 2003) (prosecutor claimed that he challenged juror because she worked for defense attorney, but there was no such evidence in the record); *Davidson v. Harris*, 30 F.3d 963 (8th Cir. 1994) (state struck several black jurors on the ground that they had children the same age as the defendant, but two white jurors who had children the same age were not struck); *Jones v. Ryan*, 987 F.2d 960, 973 (3d Cir. 1993) (same); *Jordan v. Lefevre*, 206 F.3d 196, 201 (2d Cir. 2000) (prosecutor claimed he challenged black juror because he was young and had no supervisory experience, but accepted white juror who was similarly young and inexperienced); *Riley v. Taylor*, 277 F.3d 261, 283 (3d Cir. 2001) (prosecutor claimed he challenged black juror because of attitude toward death penalty, but accepted white juror with same attitude); *United States v. Bishop*, 959 F.2d 820, 826 (9th Cir. 1992) (prosecutor claimed he challenged juror because she lived in a certain neighborhood, but because the population of that neighborhood is overwhelmingly black, that reason was deemed a proxy for race); *United States v. Alvarado*, 923 F.2d 253, 256 (2d Cir. 1991) ("the relative plausibility or implausibility of each explanation for a particular challenge . . . may strengthen or weaken the assessment of the prosecution's explanation as to other challenges. . . . "). *Collins v. Rice*, 348 F.3d 1082, 1095 (9th Cir. 2003) (fact that some of prosecutor's reasons were unconvincing undermined his credibility).

None of this probative evidence is available when a defendant is seeking to establish a *prima facie* case. Thus, a requirement that a party prove the existence of intentional discrimination *before* obtaining access to the critical evidence, namely, the challenger's reasons, would raise serious problems under the due process clause.

Accordingly, the California test improperly short-circuits the required three-step process under *Batson* and *Purkett v. Elem*. Just as the Court reversed in *Purkett v. Elem* because the lower court improperly combined steps two and three of this procedure, the Court should reverse here because the California test improperly conflates steps one and three.

C. Discriminatory Intent Cannot Ordinarily Be Shown Without Hearing the Prosecutor's Reasons

Last term, in case No. 03-6539, we surveyed all decisions reported in Westlaw from January 1, 2002 to March 1, 2004, state and federal, which cited *Batson*, and identified 84 decisions which contain or refer to a finding of invidious discrimination. In the vast majority of these cases, that finding of discrimination turned on analysis of the challenger's stated reason. We set forth in an Appendix a list of those 84 cases.

In 29 cases the court determined that the challenge was discriminatory because the articulated explanation equally applied to other jurors of a different race or gender who had not been challenged. In 20 cases the court concluded that discrimination had occurred because the articulated explanation rested on a characterization of the voir dire testimony, actions, or background of the disputed juror which was not supported by the record. In 12 cases the court rejected the peremptory challenge because the proffered reason was not race or gender neutral. In 6

decisions the trial court did not accept the proffered explanation because the cited factors had no connection with the issues or parties. In 6 cases the prosecutor failed to question the juror about any facts which underlay the articulated reason. In 4 cases, the articulated reason showed bias *in favor of* the challenger. In 11 other cases the courts concluded that the proffered explanation was "pretextual."[16] Only in 4 cases did the evidence which the objecting party had at step one play a substantial role in the ultimate finding of discrimination.

The cases in the Appendix establish that the real purpose of a *prima facie Batson* finding is to allow the objector to obtain, and the trial court to hear, the challenger's reason. Because this is akin to a discovery motion, it violates the entire *Batson* process to require an objector to prove discrimination by a preponderance of the evidence at the *prima facie* stage, before obtaining discovery, namely, the prosecutor's claimed reasons. For that would require the objector to try to prove that discrimination was more likely than not before obtaining the evidence needed to prove that discrimination was more likely than not. Such a cart-before-the-horse procedure would violate due process, just as it would violate due process to require a civil plaintiff to prove his case on the merits without discovery. See, e.g., *Swierkiewicz v. Sorema*, 534 U.S. 506, 511-512, 152 L.Ed.2d 1, 122 S.Ct. 992 (2002).

This survey establishes an additional significant set of facts. The number of disputed peremptory challenges in each of these cases, although sufficient (in conjunction with other information) to *permit* an inference of discrimination,

[16] The number of explanations exceeds the number of cases, because some have multiple explanations for the finding of a *Batson* violation.

is rarely so great as to meet California's "more likely than not" standard.

Number of Disputed Peremptory Challenges	Number of Cases
1	26
2	14
3	12
4	7
5	7
6 or more	15

Of these 84 cases[17] where a lower court found discrimination – almost always based on the articulated reason for the challenge – the vast majority would not have met the California *prima facie* case standard as applied here, namely, that no *prima facie* case was established, even though the prosecutor challenged all three black jurors. Had California's standard been in use in the rest of the country, most of these constitutional violations would have escaped undetected and unredressed, because the objectors would not have been allowed to learn or dispute the challengers' claimed reasons.[18]

Because the success of a *Batson* challenge will rise or fall on hearing the prosecutor's reason, the goals of *Batson* will only be realized by broadly construing the

[17] The total number of decisions included in this table is smaller than the total number of cases surveyed in which *Batson* violations were found, because not every case identifies the number of peremptories.

[18] There is still another problem when the challenger does not state his reason, namely, that the record is not fully developed for appeal. Without evidence of the challenger's reason, appellate review is made more difficult, because it is much harder to determine whether the trial court acted properly in rejecting a *Batson* motion.

responsibility of the trial court to ask for that reason. That will be achieved by retaining the *prima facie* threshold at the federal "permissive inference" level. However, if the threshold is set at California's unduly high "more likely than not" level, the chances to hear the challenger's reason will be minimized, and the goals of *Batson* will be thwarted.

D. Under *Batson* and its Progeny a *Prima Facie* Case Is Established When There Is Sufficient Evidence to Permit an Inference of Discrimination

The Question Presented is "whether to establish a *prima facie* case under *Batson* . . . the objector must show that it is more likely than not that the other party's peremptory challenges, if unexplained, were based on impermissible group bias?" The answer is "no." That test, used by California, is incorrect, because it requires the objector to prove his case on the merits at the *prima facie* stage, without even knowing the challenger's asserted reasons, which may turn out to be pretextual. Instead, the correct threshold for a *prima facie* case is that stated by the dissenting opinion in the court below: The objector should adduce evidence sufficient to permit an inference of discrimination. 30 Cal.4th at 1334-1339. (Jt. App. 167-171) Such standard is consistent with the rule in virtually every jurisdiction in the nation except California. (See pp. 25-30, *infra*.)

The correct rule should be: To establish a *prima facie* case, the objector should identify sufficient evidence in the record to allow a finding that the peremptory challenges, if unexplained, were based on impermissible group bias. This inference is referred to as a permissive inference. See, e.g., *Ulster County v. Allen*, *supra*.

The reasons why the standard for a *prima facie* case are, and should be, a permissive inference of discrimination are three-fold: First, only *Batson's* traditional permissive inference standard, and not California's unduly-elevated standard, can assure inquiry into the challenger's reasons when peremptory challenges may be the result of improper discrimination. Second, it is the practice in virtually every jurisdiction, other than California, that a *prima facie* case may be established by evidence which would support an inference of discrimination. Third, *Batson*'s purpose was to reduce the burden of proof for requiring inquiry as to possible discrimination. However, raising the *prima facie* threshold from a permissive inference standard to proof that discrimination "more likely than not" actually occurred, as the California court does, would increase that burden of proof, not lower it.

The test, or threshold, for establishing a *prima facie Batson* case plays a crucial role in eliminating racial discrimination in jury selection. Until a *prima facie* case is established, no inquiry need be made into reasons for a challenge. Until then, the objector lacks the information needed to show whether a challenge is discriminatory, namely, the claimed reason for a challenge. If the barrier for establishing a *prima facie* case is set too high, the necessary evidence for evaluating possible discrimination will be absent, and judicial scrutiny of possible discrimination will be unduly reduced. The threshold for establishing a *prima facie* case should be set relatively low, so close cases are not decided at the first stage of the inquiry, but only after reasons are given and evaluated.

The purpose of a *prima facie* case under *Batson* "'is to help courts and parties answer, not unnecessarily evade, the ultimate question of discrimination, *vel non*.'" *Jones v. Plaster*, 57 F.3d 417, 421 (4th Cir. 1995), quoting from *United States Postal Service Bd. of Governors v. Aikens*,

460 U.S. 711, 714, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983). That purpose will only be satisfied if the objector and the trial court can learn the reasons behind the challenges to the minority jurors whenever there is sufficient evidence to permit an inference of discrimination.

If a party is not discriminating, a simple explanation will suffice, and the case will proceed. The cost of taking a few minutes to obtain the reasons for a challenge is far lower than the cost of allowing a trial to proceed which has been contaminated by racial discrimination.

E. "Inference," as Used in Other Areas of the Law, and as Understood by the Federal Courts in Interpreting *Batson*, Refers to a Permissive Inference

1. "Inference" means permissive inference

Batson holds that an objector may establish a *prima facie* case by adducing evidence sufficient to "raise an inference" of discrimination. The inference established by a *Batson prima facie* case is merely a permissive inference, not a mandatory inference. That is so, because *Batson* cannot possibly mean that in order to *permit* an inference of discrimination, an objector must adduce evidence that, if unrebutted, *compels* a finding of discrimination.

1. Wigmore states that a *prima facie* case is most commonly shown by a permissive inference. "[T]he more common meaning of a *prima facie* case applies 'where the proponent, having the first duty of producing some evidence in order to pass the judge to the jury, has fulfilled that duty, satisfied the judge, and may properly claim that the jury be allowed to consider his case." 9 Wigmore, *Evidence* (Chadbourn rev.ed. 1981) § 2494, p. 379.

2. *Weinstein's Federal Evidence* (2d ed.) similarly makes clear in § 301.02[1] that the standard meaning of

"inference" is a "permissive" inference, not a "mandatory" presumption, and that an inference, unlike a presumption, "allows but does not require the trier of fact to infer the elemental fact from proof of the basic one. . . ."

3. In *Ulster County Court v. Allen*, *supra*, 442 U.S. at 156-157, the Court distinguished between a permissive inference and a presumption, and explained that, when facts are sufficient to establish a permissive inference, they are sufficient to establish a *prima facie* case.

> The most common evidentiary device is the entirely permissive inference or presumption, which allows – but does not require – the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and that places no burden of any kind on the defendant. [citation omitted] In that situation the basic fact may constitute *prima facie* evidence of the elemental fact.

4. In *United States v. Armstrong*, 517 U.S. 456, 470, 134 L.Ed.2d 687, 116 S.Ct. 1480 (1996), a selective prosecution case, the question was the quantum of evidence needed by a defendant to obtain discovery. The Court held the threshold was "*some evidence* of differential treatment of similarly situated members of other races," or "a credible showing of different treatment of similarly situated persons." (*Id.*, emphasis added) When an objector makes a *Batson* motion, he similarly seeks discovery, namely, the purported reason for the challenge. If the *Armstrong* standard of "some evidence," or a "credible showing" is good enough to obtain discovery in a selective prosecution case, then the *Batson* standard of "permissive inference" should be good enough to obtain what is often critical discovery in a jury discrimination case.

2. The lower courts have understood *Batson's* "inference" standard as a permissive inference

The lower courts regularly apply a permissive inference standard in evaluating a *prima facie* case under *Batson*: See, e.g., *Johnson v. Love*, 40 F.3d 658, 665 (3d Cir. 1994) ("whether a *prima facie* case was present, i.e., whether there is reason to believe that discrimination may have been at work"). In *Central Alabama Fair Housing Center v. Lowder Realty*, 236 F.3d 629, 636-637 (11th Cir. 2000), the court held the objector:

> bears the burden of establishing facts sufficient to *support an inference* of racial discrimination. . . . an inference of discrimination based on the number of jurors of a particular race may arise when there is a substantial disparity between the percentage of jurors of one race struck and the percentage of their representation on the jury. . . . Thus, the number of jurors of one race struck by the challenged party may be sufficient by itself to establish a *prima facie* case where a party strikes all or nearly all of the members of one race on a venire. (emphasis added)

C.f., *United States v. Allen-Brown*, 243 F.3d 1293, 1298 (11th Cir. 2001) (where government opposed defendant's peremptories of white jurors, court held that *Batson* "compels the trial court to act if it has a *reasonable suspicion* that constitutional rights are being violated . . . " (emphasis added)).[19]

[19] And see also *Tankleff v. Senkowski*, 135 F.3d 235, 249 (2d Cir. 1998) ("[W]here there are only a few members of a racial group on the venire panel and one party strikes each one of them, the *inference* of discrimination may arise" (emphasis added)); *Overton v. Newton*, 295 F.3d 270, 279, n. 10 (2d Cir. 2002) (*Batson* imposes only a "minimal burden . . . on a defendant to make a *prima facie* showing . . . "

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The Ninth Circuit has unanimously held in five opinions, decided by twelve different judges appointed by four different presidents, that California's *prima facie* standard presents an unduly-elevated and improperly-stringent threshold, which conflicts with this Court's permissive inference test under *Batson*. *Wade v. Terhune*, 202 F.2d 1190, 1195 (9th Cir. 2000); *Cooperwood v. Cambra*, 245 F.3d 1042, 1046 (9th Cir. 2001); *Fernandez v. Roe*, 286 F.3d 1073, 1076 (9th Cir. 2002); *Lewis v. Lewis*, 321 F.3d 824, 827 (9th Cir. 2003); *Paulino v. Castro*, 371 F.3d 1083, 1090 (9th Cir. 2004). For example, it held in *Wade v. Terhune*, *supra*, 212 F.2d at 1197:

> In our view, the *Wheeler* "strong likelihood" test for a successful *prima facie* showing of bias is impermissibly stringent in comparison to the more generous *Batson* "inference" test. . . . [T]he California Court of Appeal . . . followed the literal language of *Wheeler* and characterized its test for a *prima facie* case as "not easy." . . . We therefore conclude that California courts in following the "strong likelihood" language of *Wheeler* are not applying the correct legal standard for a *prima facie* case under *Batson*.

As shown above, California is not just out of step with the Ninth Circuit. It is out of step with other federal circuits, and with state courts as well.[20] For example, in

Mahaffey v. Page, 162 F.3d 481, 485 (7th Cir. 1998) ("an *inference* of discrimination may arise where the prosecutor makes a pattern of strikes against African-American jurors. . . . Such a pattern plainly is evident in the State's juror challenges here, where the prosecutor excused each and every African-American member of the jury venire. . . . "); *U.S. Xpress Enterprises v. J. B. Hunt Transport Co.*, 320 F.2d 809 (8th Cir. 2003) (*prima facie* case when the relevant circumstances of the voir dire support an inference of discriminatory purpose).

[20] The California Supreme Court asserted in *Johnson* that two other states agreed that the necessary "inference" must reach the level

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King v. Moore, 196 F.3d 1327 (11th Cir. 1999) the Florida state trial court had found no *prima facie* case under a test which, like an earlier version of California's test, required the opponent of a peremptory strike to show a "strong likelihood" of discrimination. The Eleventh Circuit held that this "strong likelihood" threshold was improper, because it was higher than *Batson*'s threshold, which merely requires the objector to raise an "inference" of improper motive. *Id.*, at 1334.[21]

of "more likely than not." *People v. Johnson*, *supra*, 30 Cal.4th at 1316. (Jt. App. 132) Presumably, it failed to find support from the other 48 states. In any event, the dissent in *Johnson* dispelled reliance on either of those states. *Id.*, 30 Cal.4th at 1335-1336 (Jt. App. 163) (Kennard, J. dissenting). For example, Connecticut first adopted and then rejected a preponderance standard. Its current rule is that a *prima facie* case is established when the defendant is a member of a racially cognizable group and the defendant objects to the prosecutor's challenges to members of the defendant's race. *State v. Halloway*, 209 Conn. 636, [553 A.2d 166, 171-172] (1989). This threshold is distinctly lower than that which Petitioner proposes here.

Decisions from other state courts support Petitioner including, e.g., *Valdez v. People*, 966 P.2d 587, 590 (Colo. 1998) ("the defendant is not required to prove by a preponderance of the evidence that discrimination occurred. Rather the defendant must present evidence sufficient to raise an inference that discrimination occurred."); *Conerly v. State*, 544 So.2d 1370, 1372 (Miss. 1989) ("inference" of discrimination arises under *Batson* when prosecutor strikes five of six black jurors); *State v. Henderson*, 764 P.2d 602, 604 (Or. App. 1988) ("inference" sufficient to establish a *prima facie* case arises when prosecutor strikes the only black juror in case with a black defendant).

[21] In *State v. Slappy* (Fla. 1988) 522 So.2d 18, 20-21, the Florida Supreme Court substantially relaxed its definition of the *prima facie* standard to bring it in line with *Batson*. It held, 522 So.2d at 22: "any doubt as to whether the complaining party has met its initial burden should be resolved in that party's favor. If we are to err at all, it must be in the way least likely to allow discrimination."

3. The federal courts regularly find a *prima facie* case when the challenger perempts all two or more members of a protected group, or when he perempts the majority of a protected group

The federal courts, following *Batson*'s permissive inference standard, regularly find a *prima facie* case of group bias (a) when the prosecutor strikes all two or more members of the defendant's racial group, leaving no jurors remaining from that group, or (b) when a party, in making two or more challenges to minority jurors, excludes the majority of the members of a protected group.[22]

[22] *Tankleff v. Senkowski*, 135 F.3d 235, 249 (2d Cir. 1998) (strikes of all three blacks); *United States v. Alvarado*, 923 F.2d 253, 255 (2nd Cir. 1991) (strikes of four of seven minority jurors); *Simmons v. Beyer*, 44 F.3d 1160, 1167 (3d Cir. 1995) (strikes of all three blacks); *Splunge v. Clark*, 960 F.2d 705, 707 (7th Cir. 1992) (strikes of both blacks); *Mahaffey v. Page*, 162 F.3d 481, 485 (7th Cir. 1998); *United States v. Pherigo*, 327 F.3d 690, 695 (8th Cir. 2003) (*prima facie* case where prosecutor struck only two black jurors); *McClain v. Prunty*, 217 F.3d 1209 (9th Cir. 2000) (strikes of all three black jurors); *Stubbs v. Gomez*, 189 F.3d 1099 (9th Cir. 1999) (California state court violated *Batson* in failing to determine that strikes of all three black jurors established a *prima facie* case); *United States v. Chinchilla*, 874 F.2d 695, 698 (9th Cir. 1989) (strikes of all two Hispanics); *United States v. Chalan*, 812 F.2d 1302, 1312 (10th Cir. 1989) (*prima facie* case where government struck three of four native Americans for cause, and then struck last native American peremptorily; "If all the jurors of a defendant's race are excluded from the jury, we believe that there is a substantial risk that the government excluded the jurors because of their race."); *Central Ala. Fair Housing Center v. Lowder Realty*, *supra*, 236 F.3d at 637 (the number of jurors of one race struck by the challenged party may be sufficient by itself to establish a *prima facie* case where a party strikes all or nearly all of the members of one race on a venire").

F. A Review of California Cases Shows that the California Standard Presents a Substantially Higher Threshold for a *Prima Facie* Case than the *Batson* Inference Standard

California cases establish that California's current "more likely than not" standard, or its predecessor, the "strong likelihood" standard, in effect at the time of Petitioner's trial in 1998,[23] results in setting the *prima facie* bar much higher than the federal courts set their *prima facie* bar. As a result, California courts fail to inquire as to the prosecutor's reasons for challenges to minority jurors under circumstances when virtually every other court in the country would make such inquiry. This allows parties to get away with discrimination in California, when they could not anywhere else.

In *People v. Sanders* (1990) 51 Cal.3d 471, 500-501 [273 Cal.Rptr. 537, 797 P.2d 561] the prosecutor peremptorily challenged all *four* prospective Hispanic jurors. The California Supreme Court refused to find a *prima facie* case: "Although removal of all members of a certain group may give rise to an inference of impropriety (*Wheeler*,

[23] Earlier California cases distinguished between the more stringent "strong likelihood" threshold and the less-stringent "inference" threshold, and chose to apply the former, rather than the latter. See *People v. Box* (2000) 23 Cal.3d 1153, 1188, n. 7 [99 Cal.Rptr.2d 69, 5 P.3d 130]. Subsequent to Petitioner's trial, the California court modified its position and perhaps rewrote history a bit, and now deems all these formulations of this test – "inference," "strong likelihood," "more likely than not," "preponderance of the evidence," "dispositive" inference, "conclusive" inference, and "mandatory [but] rebuttable presumption" – to be equivalent. *People v. Johnson*, *supra*, 30 Cal.4th at 1312-1318 (Jt. App. 126-128, 133-134) That court claims all these formulations satisfy *Batson*. It makes no claim that any independent state law applies. Because the California court now asserts that all these formulations are identical, Petitioner assumes, for the purposes of this argument, that the earlier strong likelihood standard is the same as the standard stated here.

supra, 22 Cal.3d at 280), we cannot say this factor was dispositive on the record. . . . " Even though the defendant had established an "inference" of discrimination, he had not established the necessary "strong likelihood" or "dispositive" inference of discrimination.

In *People v. Howard* (1992) 1 Cal.4th 1132, 1154-1156 [5 Cal.Rptr.2d 268, 824 P.2d 1315], the prosecutor peremptoried the only two prospective black jurors. No *prima facie* case was found. In affirming, the California court held "although the removal of all members of a certain group may give rise to an inference of impropriety, especially when the defendant belongs to the same group, the inference is not conclusive." *Id.* Thus, although the elimination of all the black jurors created an "inference" of racial discrimination, it did not rise to the required level of a "strong likelihood" or a "conclusive" inference needed for a *prima facie* case. Accord: *People v. Crittenden* (1994) 9 Cal.4th 83, 117-119 [36 Cal.Rptr.2d 474, 885 P.2d 887]: "the prosecutor's excusal of all members of a particular group may give rise to an inference of impropriety, especially if the defendant belongs to the same group. [T]hat inference, as we have observed, is not dispositive."[24]

The California Supreme Court held here that its "strong likelihood" standard required proof that discrimination was "more likely than not." 30 Cal.4th at 1306 (Jt. App. 116, 135) It defines that standard as requiring proof of discrimination by a preponderance of the evidence, 30 Cal.4th at 1317 (Jt. App. 133-134), and as requiring proof of a "legally mandatory [but] rebuttable presumption." 30

[24] See also *Stubbs v. Gomez*, 189 F.3d 1099 (9th Cir. 1999) (California state courts refused to find a *prima facie* case even though prosecutor perempted all three black jurors; on federal habeas corpus, district court found a *prima facie* case, directed prosecutor to state reasons, and found those reasons race-neutral).

Cal.4th at 1315. (Jt. App. 130) It held that its "more likely than not" standard was not satisfied in this case even though the prosecutor peremptoried all three black jurors in a case where a black defendant was charged with killing his white girlfriend's child.

These cases show how California's *prima facie* threshold is improperly elevated far above that established by *Batson* and its progeny. Contrary to established practice in essentially all other jurisdictions, California refuses to find a *prima facie* case, or to make inquiry of the prosecutor, even when he peremptes all two, all three, or even all four members of a protected group. Accordingly, California's "more likely than not" *prima facie* standard should be deemed to violate the rule of *Batson*.

G. Title VII Standards Do Not Support the Decision of the Court below

The state court held here that the threshold for a *prima facie Batson* case is proof that discrimination is "more likely than not," based upon the following syllogism: *Batson* adopts the requirement in Title VII employment cases of initially requiring a *prima facie* case of discrimination. Title VII cases supposedly require a finding of discrimination to establish a *prima facie* case. Ergo, *Batson* cases require proof of discrimination by a preponderance of the evidence ("more likely than not") to present a *prima facie* case. *People v. Johnson*, 30 Cal.4th at 1311, 1314 (Jt. App. 123, 129)

The syllogism is inaccurate for two reasons. (i) Title VII cases do not require proving the existence of discrimination to create a *prima facie* case. (ii) In any event, less evidence is required to establish a *prima facie* case under *Batson* than under Title VII.

1. Title VII cases do not require proof that discrimination was more likely than not to create a *prima facie* case

The holding of the California Supreme Court is based on a fundamental misunderstanding of this Court's Title VII decisions. In a Title VII case a plaintiff emphatically is not required, in order to create a *prima facie* case, to show by a preponderance of the evidence that the employer engaged in discrimination.

In analyzing claims of employment discrimination under *McDonnell Douglas v. Green*, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973), courts use the three-step methodology upon which *Batson* is modeled, namely, (1) the plaintiff must establish a *prima facie* case; (2) the defendant employer states its reason for its decision; (3) the trier of fact determines whether the employer treated plaintiff less favorably because of impermissible factors. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 575-577, 57 L.Ed.2d 957, 98 S.Ct. 2943 (1978).

In *Furnco* this Court reversed a lower court decision for confusing the first and third steps of the *McDonnell Douglas* analysis. The lower court, *Furnco* held, "went awry ... in apparently equating a *prima facie* showing under *McDonnell Douglas* with an ultimate finding of fact as to the discriminatory refusal to hire under Title VII; the two are quite different.... " 438 U.S. at 576. This is essentially the same error which the California court committed here. Under *McDonnell Douglas* and *Furnco* a *prima facie* case arises not because the plaintiff caused the trier of fact *actually to make* a finding that the defendant's actions (to the extent they remain unexplained) were indeed discriminatory, but because the plaintiff adduced enough evidence to *permit* such an inference.

This Court has repeatedly held in Title VII cases that evidence from which the trier of fact *could* infer the

existence of a discriminatory motive (a permissive inference) is sufficient to create a *prima facie* case under *McDonnell Douglas*. A plaintiff can meet his initial burden of establishing a *prima facie* case by "showing actions taken by the employer from which *one can infer*, if such actions remain unexplained, that it is more likely than not that such actions were based on a discriminatory criterion illegal under the Act." *Furnco Construction Co., supra*, 438 U.S. at 576 (*quoting McDonnell Douglas*). Thus, the *McDonnell Douglas* and *Furnco* test requires a permissive inference but no more.[25] Under this standard, the burden on the plaintiff is to identify evidence which allows a court to "infer" that discrimination occurred.[26]

This *McDonnell Douglas-Furnco* Title VII *prima facie* standard is very different from the rule adopted by the court below, which required the objecting party at the *prima facie* stage to prove by a preponderance of the evidence that discrimination actually occurred. In *Teamsters v. United States*, 431 U.S. 324, 358, 52 L.Ed.2d 396, 97 S.Ct. 1843 (1977), this Court made clear that a plaintiff

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[25] *McDonnell Douglas* established a four-part formula deemed sufficient per se to create a *prima facie* case:

> This may be done by showing (i) that [the complainant] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. at 802. This evidence is not so overwhelming that it would compel a trier of fact to conclude that discrimination had occurred.

[26] Under *Furnco Construction* the phrase "more likely than not" does not describe the strength of the evidence needed to establish the plaintiff's inference. Instead, the phrase "more likely than not" characterizes what the trier of fact may find if it accepts plaintiff's inference, namely, that discrimination was more likely than not.

can create a *prima facie* case with an "initial showing [that] *justified* the inference that the minority applicant was denied employment opportunity for reasons prohibited by Title VII" (emphasis added).

In arriving at its conclusion that *Batson* requires that an objector prove the existence of discrimination in order to establish a *prima facie* case, the California Supreme Court relied largely on a single sentence in Wigmore's *Evidence*. The court below reasoned as follows: (1) Footnotes 18 and 20 in *Batson* refer to the Title VII decision in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 67 L.Ed.2d 207, 101 S.Ct. 1089 (1981), and *Burdine* is "one of the cases cited in *Batson*." (2) Footnote 7 in *Burdine*, which is not the passage quoted in *Batson*, in turn refers to section 2494 in Wigmore's *Evidence*. (3) Section 2494 in Wigmore's *Evidence* contains a sentence – not quoted in either *Batson* or *Burdine* – which purportedly states that the type of *prima facie* case created in a Title VII case must be based on "strong evidence" which compels the very conclusion mandated by the presumption. "Thus," the court below reasoned, "*Batson* permits a court to require . . . [such] 'strong evidence.'" *People v. Johnson*, 30 Cal.4th 1314-1316. (Jt. App. 129-131)

Neither the meaning of *Batson* or *Burdine*, nor that of any decision of this Court, can be divined in this extraordinarily strained manner. None of the members of the Court who joined the decision in *Batson* or *Burdine* could possibly have understood they were endorsing the contents of section 2494, as defining what needed to be shown for a *prima facie* case.[27]

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[27] Section 2494 emphatically does not require "strong evidence" to create a mandatory inference. The section in question states that a *prima facie* case creates a mandatory inference

(Continued on following page)

The court below mischaracterized footnote 7 in *Burdine* as stating that a Title VII plaintiff seeking to create a *prima facie* case must adduce evidence so overwhelming that a trier of fact would be obligated to make a finding of discrimination. *People v. Johnson*, 30 Cal.4th 1314-1316. (Jt. App. 129-131) That footnote in *Burdine*, 450 U.S. at 254, n. 7, actually reads:

> The phrase "prima facie case" may denote not only the establishment of a legally mandatory, rebuttable presumption, but also may be used by the courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue.... *McDonnell Douglas* should have made it apparent that in the Title VII context we use "prima facie case" in the former sense.

However, this footnote only concerns the *consequence* of creating a Title VII *prima facie* case, not the type or quantity of evidence needed to do so. A Title VII plaintiff can establish a *prima facie* case with evidence sufficient to permit a finding of discrimination (a permissive inference). *Furnco Construction*, *supra*; *McDonnell Douglas*, *supra*.

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where the proponent, having the burden of proving the issue (i.e., the risk of nonpersuasion of the jury), has not only removed by sufficient evidence the duty of producing evidence to get past the judge to the jury, but has gone further, and, *either by means of a presumption or by a general mass of strong evidence*, has entitled himself to a ruling that the opponent should fail if he does nothing more in the way of producing evidence.

9 Wigmore, *Evidence*, § 2494, p. 379 (1979 ed.) (emphasis added). Clearly a general mass of strong evidence is not the *only* manner of creating a mandatory inference; such a mandatory inference may also arise because of a presumption. This Court's numerous decisions regarding the *McDonnell Douglas prima facie* case contain no reference to any "strong evidence" requirement.

Once a plaintiff has established a *prima facie* case, then he is entitled to a rebuttable presumption of discrimination. *Id.* The sole purpose of that presumption is to compel the employer to articulate a reason for the disputed action; once the employer has done so, the presumption disappears. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507, 125 L.Ed.2d 407, 113 S.Ct. 2742 (1993). Thus, because a showing of "strong evidence," within the meaning of Wigmore § 2494, is not needed to get a Title VII case to a jury, it would be nonsensical to require proof at that elevated level merely to establish the preliminary step of a *prima facie* case.

2. Less evidence is required to establish a *prima facie* case under *Batson* than under Title VII

Title VII cases cannot be used against Petitioner. Less evidence is required to establish a *prima facie* case under *Batson* than under Title VII for several reasons.

(a) **No presumption:** Under Title VII, proof of a *prima facie* case creates a rebuttable presumption of discrimination. *Furnco Construction Corp. v. Waters*, *supra*. Under *Batson*, to the contrary, proof of a *prima facie* case merely requires the challenger to give reasons for his peremptory challenges. It does not create any presumption at all. *Purkett v. Elem*, *supra*, 514 U.S. at 768. For this reason, among others, the *prima facie* threshold and *prima facie* burden under *Batson* are, and need to be, substantially lower than that under Title VII, because the latter need to be strong enough to establish a presumption of discrimination, while the former do not.

(b) **No discovery:** In *Swierkiewicz v. Sorema*, 534 U.S. 506, 152 L.Ed. 1, 122 S.Ct. 992 (2002), the Court held that the district court complaint in a Title VII case need not allege enough facts to establish all four elements of a

prima facie case under *McDonnell Douglas*. The Court held in *Swierkiewicz*, 534 U.S. at 511-512, that the imposition of such a heightened requirement at the pleading stage would be incongruous and premature, because the plaintiff would not yet have been able to use discovery to obtain the necessary evidence:

> It thus seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered. . . . Before discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required *prima facie* case in a particular case. Given that the *prima facie* case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard for discrimination cases.

Swierkiewicz should apply here. The objector to a peremptory challenge, just like the Title VII pleader under *Swierkiewicz*, should not be required to state every possible evidentiary fact, or to show that discrimination is "more likely than not," at the initial stage of his case to present a *prima facie* claim, because, until obtaining discovery, he is largely unable to state those facts.

(c) **No investigation:** When a Title VII plaintiff's *prima facie* case is tested (such as on summary judgment), he will have his knowledge of his own job situation. He will have conducted investigation as well as discovery. He will have amassed files, if not boxes, full of information before being required to prove that his *prima facie* case is "more likely than not." By contrast, all a *Batson* objector knows is the identity of the challenged jurors. He does not know the proffered reason why they were challenged, or why other jurors were retained. Because the quantities of proof available in these two types of cases are so different,

it would be incongruous and illogical to require *Batson* objectors to prove their *prima facie* cases by the same quantum of evidence as required in Title VII.

II. THE LOWER COURTS' RELIANCE UPON CONJECTURAL JUSTIFICATIONS AT THE *PRIMA FACIE* STAGE VIOLATES THE RULE OF *PURKETT V. ELEM* THAT A *PRIMA FACIE* CASE IS TO BE EVALUATED WITH THE CHALLENGES "UNEXPLAINED"

A. No Conjectured Explanations Should Be Relied upon at the *Prima Facie* Stage

The Question Presented is whether, to establish a *prima facie* case, the objector must show "that it is more likely than not that the other party's peremptory challenges, *if unexplained*, were based upon impermissible group bias" (emphasis added) (Respondent's position), or whether the objector merely must adduce evidence sufficient to permit an inference that "the other party's peremptory challenges, *if unexplained*, were based upon impermissible group bias." (Petitioner's position) Either way, a *prima facie* case is to be established before the challenges are "explained."

California's Supreme Court disregards this principle. When a *prima facie* case is denied, the prosecutor does not give a reason for his challenge. Nonetheless, the California courts regularly allow the trial judge, the prosecution on appeal, and the appellate court to postulate hypothetical justifications for challenges in order to disprove a *prima facie* case, although, by definition, the *prima facie* case is to be evaluated before explanations are given.

Here, for example, when the trial court denied a *prima facie* case, it based that decision on speculation that possible race-neutral justifications for the challenge to

Sara Edwards were her father's arrest for robbery 30 or 35 years earlier, and her emotional reaction to the charges of child abuse. (Jt. App. 10) That court attached conclusive importance to its views that such circumstances "would have justified a peremptory challenge." (Jt. App. 9) Similarly, on appeal, the state attorney general and a dissenting judge on the intermediate appellate court speculated that possible justifications for Ms. Edwards' challenge were her failure to answer one out of 62 questions on her juror questionnaire, and that she was childless (supposedly making her less sympathetic to a child's death).[29] (Jt. App. 110-112) Overall, the prosecution on appeal hypothesized 15 such possible "permissible reasons" for the challenges to the black jurors. (See pp. 4-6, *supra*)

The state supreme court deemed such speculation proper – indeed, dispositive – when it held that, where a trial judge finds no *prima facie* case, affirmance on appeal is required "if the record suggests grounds on which the prosecutor might reasonably have challenged the jurors." *Johnson*, 30 Cal.4th at 1325. (Jt. App. 147) Petitioner disagrees. Such speculation is premature and improper at the *prima facie* stage.

(1) Consideration at the *prima facie* stage as to possible reasons for challenges wrongly conflates *Batson*'s step one analysis (*prima facie* case) with step three (evaluation of the prosecutor's explanations and decision on the merits). This improper conflation, like that discussed at pp. 13-18, *supra*, violates *Purkett v. Elem*. It flouts the requirement of separate analysis at each of the three *Batson* steps. At step one the court decides whether the evidence relied upon by the objector is sufficient "if

[29] Petitioner shows at pp. 45-46, *infra*, that each such speculative reason equally applied to multiple white jurors who were seated, which indicates that reliance upon any such reason would be pretextual.

unexplained" to create a *prima facie* case. At step one the court is not to consider possible explanations offered by the prosecutor, hypothesized by appellate counsel, or conjured up by the court itself. "Unexplained" means just that – unexplained.

(2) At step one, if the challenger states his reasons, the question of whether there is a *prima facie* case becomes moot, and the court proceeds to determine whether the asserted reason is race-neutral (step two), and whether the reason is valid and credible (step three). *Hernandez v. New York*, *supra*, 500 U.S. at 359 (plurality opinion), citing *United States Postal Service Board v. Aikins*, 460 U.S. 711, 715, 75 L.Ed.2d 403, 103 S.Ct. 1478 (1983) (a Title VII case)); *Stubbs v. Gomez*, *supra*, 189 F.3d at 1104. Because stated reasons move a case beyond the *prima facie* stage, postulated or speculative reasons, serving as a proxy for stated reasons, are similarly inapplicable at the *prima facie* stage.

(3) *Batson* only provides for consideration of the prosecutor's actual reason, not for consideration of conjectured or "permissible" reasons. When there is no proof that the conjectured reasons reflect the prosecutor's real motivation, they should not be relied upon, because they "cannot be mistaken for the actual reasens for a [peremptory] challenge." *Mahaffey v. Page*, *supra*, 162 F.3d at 483-484, n. 1.

As Judge Kozinski held in *Paulino v. Castro*, 371 F.3d 1083, 1090 (9th Cir. 2004), "[I]t does not matter that the prosecutor might have had good reasons to strike the prospective jurors. What matters is the real reason they were stricken ... [and] an actual explanation from the prosecutor." Accord: *Riley v. Taylor*, 277 F.3d 261, 282 (3d Cir. 1999) (en banc) ("Apparent or potential reasons do not shed any light on the prosecutor's intent or state of mind when making the peremptory challenge"); *Bui v. Haley*,

321 F.3d 1304, 1313-1316 (11th Cir. 2003) (reasons given at post-trial hearing why assistant prosecutor would have challenged jurors fail to satisfy *Batson*, because no showing that chief prosecutor actually relied upon those reasons). To say that certain facts about a juror *could* have supported a nondiscriminatory challenge cannot establish that those facts were *actually* relied upon by the challenger, or that race-neutral reasons were employed.

(4) Written speculation, after the fact, on appeal, as to possible justifications is not proper. Under *Batson*, once a *prima facie* case has been established, "*the prosecutor* must articulate a neutral explanation." *Batson*, 476 U.S. at 98 (emphasis added). He must do so personally by a statement in open court. This Court has emphasized the importance of demeanor evidence in resolving *Batson* claims. *Hernandez v. New York*, 500 U.S. 352, 365, 114 L.Ed.2d 395, 111 S.Ct. 1859 (1991). Demeanor evidence would be unavailable if a prosecutor were permitted at step two to respond after the fact with a written explanation of his actions. Thus, the state's burden may not be satisfied through written arguments by an appellate attorney[29] who may or may not have any personal knowledge of the reason for the peremptory challenge.[30] *A fortiori* a court cannot itself assume the prosecution's burden and hypothesize possible explanatory motivations.

(5) When the trial court and the prosecution on appeal conjectured at the *prima facie* stage as to possible reasons, that effectively required Petitioner not simply to establish an inference of discrimination, but also to prove

[29] See *Burdine*, 450 U.S. at 255, n. 9 (defendant's Title VII burden cannot be met "merely through an answer or by an argument of counsel.");

[30] See *Bui v. Haley*, *supra*, 321 at 1313-1316 (rejecting explanation by co-counsel who had not made the decision to exercise the challenge.)

that there were no possible nondiscriminatory motives for the strikes. By obligating Petitioner to defend at the *prima facie* stage against an almost infinite number of known and unknown possible reasons, the court below imposed upon Petitioner a far greater burden at the *prima facie* stage than he would have had at the merits stage. For, at the merits stage, he would only need to address the limited number of reasons actually stated by the prosecution, not the entire universe of imaginable reasons.

Batson did not intend that the objector's *prima facie* burden at step one be more onerous than his merits burden at step three. *Batson* did not intend that an objector lose a motion at the step one *prima facie* stage, simply because he cannot guess the reason upon which the prosecutor will later claim reliance, when the objector might win on the merits at step three, once he knows the prosecutor's claimed – and likely pretextual – reasons.

(6) The California court barred Petitioner on appeal from rebutting such conjectured reasons by pointing to evidence in the record that similar white jurors had not been challenged. *People v. Johnson*, 30 Cal.4th 1318 (Jt. App. 135) Such a ruling presents a double standard, and offends the Fifth Amendment's due process clause, because the bar to new arguments on appeal does not apply to the prosecution. Under current California procedure, (a) the state is regularly allowed, for the first time on appeal, to advance possible reasons for challenges (which were not presented at trial), but (b) the defense is not allowed to rebut those speculations, when it hears about them, years later, for the first time on appeal. This double standard allowing one side, but not the other, to raise new arguments on appeal, and not allowing the other side to respond, offends "the old adage about sauce and geese, which need not be given a citation." *Midstate Co. v. Penna R. Co.*, 320 U.S. 356, 367, 64 S.Ct. 128 (1943).

It would be, and was, manifestly impossible for defense counsel at trial to adduce or point to comparative juror evidence to rebut the hypothetical reasons which were not advanced by the state's lawyer until two years later on appeal.

Under proper *Batson* procedure, once the prosecutor articulates a reason for a disputed peremptory (step two), the defendant at step three may try to establish pretext by showing that comparable white jurors had not been challenged. If so, that may show the claimed reason for the challenge is pretextual. Such comparative juror analysis is the law of the land. *Miller-El v. Cockrell*, *supra*, 123 S.Ct. at 1043-1044. Comparative juror analysis has been uniformly applied in all 12 federal circuits.[31]

Every equal protection claim asks whether similarly-situated individuals have been treated differently on the basis of a constitutionally protected classification. As the Court held in *Texas Dep't of Community Affairs v. Burdine*, *supra*, 450 U.S. at 258, "it is the plaintiff's task to demonstrate that similarly situated employees were not treated equally." This elementary principle applies in juror selection cases, too. *Miller-El v. Cockrell*, 123 S.Ct. at 1042-1044.

[31] *Caldwell v. Maloney*, 159 F.3d 639, 653 (1st Cir. 1998); *Jordan v. Lefevre*, 206 F.3d 196, 201 (2d Cir. 2000); *United States v. Alvarado*, 923 F.2d 253, 256 (2nd Cir. 1991); *Jones v. Ryan*, 987 F.2d 960, 963 (3rd Cir. 1993); *Howard v. Moore*, 131 F.3d 399, 408 (4th Cir. 1997); *Hicks v. Johnson*, 186 F.3d 634, 637 (5th Cir. 1999); *United States v. Hatchett*, 918 F.2d 631, 636 (6th Cir. 1990); *Henderson v. Walls*, 296 F.3d 541, 548 (7th Cir. 2002); *Mahaffey v. Page*, *supra*; *Coulter v. Gilmore*, 155 F.3d 912, 921 (7th Cir. 1998); *Ford v. Norris*, 67 F.3d 162, 168 (8th Cir. 1995); *Devose v. Norris*, 53 F.3d 201 (8th Cir. 1995); *McClain v. Prunty*, 217 F.3d 1209, 1215, 1222 (9th Cir. 2000); *United States v. Chalan*, 812 F.2d 1302, 1314 (10th Cir. 1987); *Hollingsworth v. Burton*, 30 F.3d 109, 112 (11th Cir. 1994); *United States v. Wynn*, 20 F.Supp.2d 7, 13-15 (D.D.C. 1997).

However, the California Supreme Court, virtually alone among all state and federal jurisdictions, refuses to examine whether speculative reasons would also apply to white jurors who have been accepted. If so, that would constitute strong evidence that the claimed reasons for the challenge to the minority jurors are pretextual. *Miller-El v. Cockrell*, *supra*. The California courts' refusal to apply even that limited degree of scrutiny to speculative reasons violates due process and is contrary to *Miller-El*.[32]

[32] The California Supreme Court has given two alternative and somewhat inconsistent rationales for prohibiting defendants from arguing regarding comparable white jurors when the defense hears, for the first time, on appeal, the state's hypothesized reasons for the challenges to minority jurors. Both rationales violate *Miller-El*. (1) First, in cases decided both before and after the instant case, that court has categorically refused to allow, at any stage, comparative juror analysis when evaluating whether proffered reasons are pretextual. *People v. (James) Johnson* (1989) 47 Cal.3d 1194, 1216-1221 [255 Cal.Rptr. 569, 767 P.2d 1047]; *People v. Arias* (1996) 13 Cal.4th 92, 136, n. 16 [51 Cal.Rptr.2d 770, 913 P.2d 980]; *People v. Reynoso* (2003) 31 Cal.4th 903, 920 [3 Cal.Rptr.3d 769, 74 P.3d 852]. California stands alone in the nation in this refusal. (2) Second, the California court held here that, because comparative juror analysis was not used at trial, then it may not be utilized on appeal. *People v. Johnson*, 30 Cal.4th at 1319-1321. (Jt. App. 137-141)

These conclusions are wrong for several reasons: (a) They are contrary to *Miller-El*, which uses comparative juror analysis on appeal. *Miller-El* retroactively applies to the instant case. *Griffith v. Kentucky*, 479 U.S. 314, 93 L.Ed.2d 649, 107 S.Ct. 708 (1987). (b) Under federal law, comparative juror analysis may be used for the first time on appeal. *United States v. Alanis*, 335 F.3d 965, 969, n. 5 (9th Cir. 2003). (c) The claim that comparative juror analysis could have been used at Petitioner's trial in 1998 is inaccurate. For many years, as even the dissenting justice at the state Court of Appeal acknowledged, 88 Cal.App.4th 342-344 (Jt. App. 103-106), California barred comparative juror analysis from being used at any stage, including at trial. Thus, any attempt to use it at trial here would have been futile. See, e.g., *People v. Arias*, *supra*, 13 Cal.4th at 136, n. 16, where that court held:

> Just as an appellate court will not compare the responses of rejected and accepted jurors to determine the bona fides of

(Continued on following page)

B. The Prosecution's Conjectured Explanations Should Be Rejected as Pretextual, Because They Equally Apply to White Jurors Who Were Accepted

The California Court of Appeal found here, under comparative juror analysis, that every reason hypothesized to support the prosecutor's challenges to two of the three black jurors (e.g., unanswered questions on juror questionnaires, family members with arrest history, childlessness) equally applied to *multiple* white jurors whom the prosecutor accepted. Thus, if *arguendo*, the prosecutor's after-the-fact conjectured explanations may be examined, reliance on such explanations should be rejected as pretextual. *Miller-El v. Cockrell*, *supra*.

As to prospective juror Clodette Turner, the California Court of Appeal gave, as one of several examples of pretext, 88 Cal.App.4th at 333-334 (Jt. App. 80-81):

> No basis other than race appears for the prosecutor's peremptory challenge of Ms. T.. . . . The fact that she left questions 57 and 58 blank cannot be credited as a valid justification in light of the fact that the same thing was done by white juror number 7 (questionnaire #50) who also explained he had no opinions on the subject of

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> the justifications offered, so the trial court itself has no obligation to perform such an analysis. "[W]e fail to see how a trial judge can reasonably be expected to make such detailed comparison mid-trial." (*People v. Johnson, supra*, 47 Cal.3d 1194, 1220.) Moreover, as we have indicated, such an analysis is largely beside the point, . . .

The instant opinion, which purports to allow comparative juror analysis on appeal, if only it were used at trial, presents an impossible-to-satisfy "Catch-22," because the state courts bar any such analysis at trial.

> those questions, and by white juror number 10 (questionnaire #89).[33]

As to prospective juror Sara Edwards, the California Court of Appeal held, 88 Cal.App.4th 333-334 (Jt. App. 83) that any reliance upon the arrest of her father 35 years ago for robbery would be pretextual.

> [T]he prosecutor failed to challenge several whites who served on the jury who themselves or whose families were much more recently the subject of criminal charges. Juror number 9's brother was arrested for battery on a police officer just three years earlier. The brother of alternate juror number 1 was arrested for statutory rape seven years earlier. . . . three other seated jurors had themselves been arrested for driving under the influence of alcohol or a related charge. . . .

Other examples of pretextual reasons for these challenges are at 88 Cal.App.4th 333-334. (Jt. App. 81-85)

Neither Respondent nor the California Supreme Court has ever rebutted the examples of pretext identified by the Court of Appeal. If comparative juror analysis were applied here, it would clearly establish a *prima facie* case of a *Batson* violation for these two black jurors.

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[33] The dissenting Court of Appeal justice suggested one further possible reason, namely, Ms. Turner's childlessness. 88 Cal.App.4th at 347 (Jt. App. 112) This claim, too, fails under comparative juror analysis. The prosecution accepted four white jurors and one Hispanic juror who were similarly childless. (Juror #6, questionnaire 78; Juror #9, questionnaire 41; Juror #10, questionnaire 89; Juror #11, questionnaire 42; Juror #12, questionnaire 81).

III. A *PRIMA FACIE* CASE OF A *BATSON* VIOLATION IS SHOWN ON THIS RECORD

A. This Court Should Decide Whether There Is a *Prima Facie* Case Here

Petitioner requests that the Court resolve the question of whether the record establishes a *prima facie* case. It is six years since the *Batson* motion here. Additional delay in determining this issue will permit further deterioration of the memories of court and counsel regarding the voir dire in December, 1998. Should this *Batson* challenge ultimately be sustained, and a new trial be required, additional delay in resolving that challenge will further dim the witnesses' memories.

Resolution by this Court is also warranted to remove a misapprehension created by this Court's decision in *Miller-El v. Cockrell*, *supra*, 537 U.S. 322. In holding that no *prima facie* case existed here, the California Supreme Court stressed that the evidence in *Miller-El* was "far stronger than here." *People v. Johnson*, 30 Cal.4th at 1327. (Jt. App. 150) The particular circumstances of *Miller-El* were in several respects extraordinarily unique.[34] If the lower courts were to treat the facts of *Miller-El* as the paradigm of a *prima facie* case, *Batson* would be virtually a dead letter. The lower courts need guidance from this Court in the assessment of a *prima facie* case under less atypical circumstances.[35]

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[34] For example, the Texas jury shuffle procedure involved in *Miller-El* exists in few other states. The circular issued by the Dallas District Attorney's office, recommending that prosecutors avoid jurors of several ethnic groups, was withdrawn in 1976, a quarter century ago. Miller-El was tried in 1986, in a pre-*Batson* era when prosecutors openly engaged in discriminatory practices which they then believed lawful.

[35] The California Supreme Court asserted in the instant case that, compared to *Miller-El*, "the number of strikes is smaller, and thus

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B. A *Prima Facie* Case Is Established by the Fact that the Prosecutor Perempted All Three Black Jurors in this Racially-Charged Case

The facts here support an inference of intentional discrimination. The prosecution peremptorily challenged 100% of the black prospective jurors (3 of 3), but only 22% of the non-blacks (9 of 40). (Jt. App. 9-11, 13) The California Supreme Court correctly characterized this pattern as "indeed troubling," noting that "it certainly looks suspicious that all three black prospective jurors were removed from the jury." *People v. Johnson*, 30 Cal.4th at 1328. (Jt. App. 149) Nonetheless, that court held that such a pattern of challenges was "perhaps more explainable by happenstance." *Id.*, 30 Cal.4th at 1327 (Jt. App. 151)

It was quite unlikely that this 100% exclusion occurred by happenstance. The probability of such complete exclusion occurring by chance was approximately 1 in 87.[36]

In *Miller-El v. Cockrell*, 123 S.Ct. at 1042, the Court held that a *prima facie* case may be shown by "statistical evidence alone." The issue at the *prima facie* stage is neither the credibility of a racially-neutral explanation nor

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perhaps more explainable by happenstance." *People v. Johnson*, 30 Cal.4th at 1327. (Jt. App. 151) In *Miller-El* the prosecution excused 3 of 31 non-African-American jurors (9.67%) and 10 of 11 African-Americans (90.9%). If the prosecution had excused all jurors at the 9.67% rate, the probability that 10 of the 11 African-American jurors would have been excused would have been less than one in a million ($.0967^{11}$). If that is the degree of unlikelihood needed to establish a *prima facie* case, it is unlikely that any other *Batson* challenge will ever succeed.

[36] The prosecution exercised peremptory challenges against 22.5% of the non-African-American jurors. The likelihood that the three African-American jurors (or any other three specific jurors) would be removed by peremptory challenge is (.225)x(.225)x(.225)=.01139. The inverse of .01139 is 87.8.

the ultimate question of bias, but merely the appearance of such bias as would call for an explanation. Striking all three black jurors clearly presents the appearance of bias, warranting an explanation. These facts alone should establish a *prima facie* case.

Further, the facts of this homicide were likely to inflame racial animus. Johnson was charged with killing his white girlfriend's child. His defense depended on his credibility. Even a prosecutor who harbored no personal animus towards black defendants might have thought that white jurors would be more likely to convict because of the race of the individuals involved. The state court acknowledged that these racial "circumstances are obviously highly relevant to whether a prima facie case existed." *People v. Johnson*, 30 Cal.4th at 1326. (Jt. App. 198)

Finally, even if the Court were to examine the personal characteristics of the challenged black jurors to look for obvious reasons for their challenges – a course of action which we contend is inappropriate at step one of the *Batson* analysis – none appear. No one at the trial court identified any problem whatsoever as to Clodette Turner. No one ever identified any factor as to Sara Edwards which did not equally apply to several white jurors who were accepted. For these reasons the Court should determine, consistent with the majority at the state Court of Appeal and the dissent at the state Supreme Court, that there was a *prima facie Batson* case.

CONCLUSION

Unjust convictions of African-American defendants by all-white juries have played a long and tragic role in the

history of the American legal system.[37] The use of peremptory challenges to create an all-white jury is not always conclusive evidence of an invidious discriminatory scheme. But where an all-white jury has been created by the use of two or more peremptory challenges against black jurors (and here the prosecutor used three), the appearance of justice would be intolerably compromised if the court refused even to ask the prosecutor to explain that action.

Accordingly, Petitioner respectfully requests that the Court rule: (1) that California's standard for the inference needed to present a *prima facie* case of discrimination under *Batson* is incorrect; (2) that a *prima facie* case is presented on the record here; and (3) that the decision of the California Supreme Court should be reversed.

Respectfully submitted,

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[37] See, e.g., *Georgia v. McCollum*, *supra*, 505 U.S. at 61, n. 1 (Thomas, J. concurring), noting frequent criticism of "all white juries."

APPENDIX
STATE AND FEDERAL DECISIONS FINDING *BATSON* VIOLATIONS JANUARY 1, 2002 TO MARCH 1, 2004

Berry v. State, 2004 WL 351050 at *8 (Md. App.) (unknown number of disputed peremptory challenges; one peremptory found to violate *Batson*; *Batson* violation found because the proffered explanation was "discredited").

Besser v. Walsh, 2003 WL 22093477 at *26-*30 (S.D.N.Y.) (seven disputed peremptory challenges; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race).

Bounds v. Taylor, 77 Fed. Appx. 99, 106-07, 2003 WL 22325312 (3d Cir. 2003) (one disputed peremptory challenge; *Batson* claim upheld because the explanation was based on a characterization of the challenged juror that was not supported by the record, and because the explanation was not "plausible").

Brown v. State, 256 Ga. App. 209, 568 S.E. 2d 62, 63 (Ga. App. 2002) (one disputed peremptory challenge; *Batson* claim upheld because the proffered explanation was not race neutral).

Bui v. Haley, 321 F. 3d 1304 (11th Cir. 2003) (eleven disputed peremptory challenges; *Batson* claim upheld because attorney who proffered explanations for the disputed challenges lacked personal knowledge of the reasons for which a different attorney had exercised those challenges).

Commonwealth v. Maldonado, 439 Mass. 460, 788 N.E. 2d 968 (2003) (one disputed peremptory challenge; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race).

Collins v. Rice, 348 F. 3d 1082 (9th Cir. 2003) (two disputed peremptory challenges; *Batson* claim upheld because the proffered explanation was not gender neutral, because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race, and because the explanation was based on a characterization of the challenged juror that was not supported by the record).

Davey v. Lockheed Martin Corp., 301 F. 3d 1204 (10th Cir. 2002) (three disputed peremptory challenges; *Batson* claim upheld because the explanation was based on a characterization of the challenged juror that was not supported by the record).

Davis v. State, 818 So. 2d 1260, 1262-65 (Miss. 2002) (one disputed peremptory challenge; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race).

Dorsey v. State, 2003 WL 22964719 (Fla. Sup. Ct.) (one disputed peremptory challenge; *Batson* claim upheld because the explanation was based on a characterization of the challenged juror that was not supported by the record).

Duran v. State, 2002 WL 15859 (Tex. App. 14th Dist.) (one disputed peremptory challenge; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race, and because the proffered explanation was not related to the parties or issue in the case).

Fleming v. State, 825 So. 2d 1027 (Fla. App. 1st Dist. 2002) (three disputed peremptory challenges; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race and because challenger had challenged all three black prospective jurors).

Gaines v. State, 258 Ga. App. 902, 575 S.E. 2d 704 (2003) (at least four disputed peremptory challenges; reason for sustaining *Batson* claim not stated).

Gay v. State, 258 Ga. App. 634, 574 S.E. 2d 861 (2002) (thirteen disputed peremptory challenges; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race).

Gibson v. State, 117 S.W. 2d 567 (Tex. Ct. App. 2003) (four disputed peremptory challenges; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race, and because the circumstances relied on in the explanation actually favored the party that had challenged the juror).

Harrison v. State, 2003 WL 1949812 (Ala. Crim. App.) (two disputed peremptory challenges; *Batson* claim upheld because the explanation was based on a characterization of the challenged juror that was not supported by the record).

Holloway v. Horn, 355 F. 3d 707 (3d Cir. 2004) (eleven disputed peremptory challenges; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race).

Jackson v. State, 832 So. 2d 579 (Miss. App. 2002) (eleven disputed peremptory challenges; attorney's statement that he wanted to "get down the line to some other jurors" did not constitute a race neutral reason).

Lancaster v. Adams, 324 F. 3d 423 (7th Cir. 2003) (one disputed peremptory challenge; *Batson* claim upheld because explanation was "pretextual").

Lansdale v. Hi-Health Supermart Corp., 54 Fed. Appx. 268, 2002 WL 31856113 (9th Cir. 2002) (three disputed peremptory challenges; reason for sustaining *Batson* claim not stated).

Lenoir v. State, 830 So. 2d 703 (Miss. App. 2002) (eight disputed peremptory challenges; *Batson* claim upheld because the explanation was based on a characterization of the challenged jurors that was not supported by the record).

Lewis v. Lewis, 321 F. 3d 824 (9th Cir. 2003) (one disputed peremptory challenge; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race, and because the explanation was based on a characterization of the challenged juror that was not supported by the record).

McCormick v. State, 2004 WL 350987 (Ind.) (one disputed peremptory challenge; *Batson* claim upheld because the proffered explanation was not race neutral).

Mills v. State, 813 So. 2d 688 (Miss. 2002) (three disputed peremptory challenges; *Batson* claim upheld because the proffered explanation was not related to the parties or issue in the case).

Montgomery v. State, 811 So. 2d 417 (Miss. 2002) (three disputed peremptory challenges; *Batson* claim upheld because the explanation was based on a characterization of the challenged juror that was not supported by the record and because the proffered explanation was not race neutral).

Murphy v. State, 2003 WL 22989233 (Miss. App.) (two disputed peremptory challenges; statement that attorney "just had a bad feeling about" disputed juror did not constitute a race neutral reason).

Paschal v. Flagstar Bank, 295 F. 3d 565, 574 (6th Cir. 2002) (one disputed peremptory challenge; *Batson* claim upheld because the challenging party had failed to question the challenged juror about the problem of possible bias stated in the proffered explanation).

People v. Allen, 9 Cal. Rptr. 4th 374 (Cal. App. 1st Dist. 2004) (two disputed peremptory challenges; *Batson* claim upheld because the explanation was based on a characterization of the challenged juror that was not supported by the record).

People v. Alston, 307 A.D. 2d 1046, 763 N.Y.S. 2d 764 (App. Div. 2d Dept. 2003) (one disputed peremptory challenge; *Batson* claim upheld because explanation was "pretextual").

People v. Armstrong, 2003 WL 22299824 (Mich. App. 2003) ("several" (apparently two) disputed peremptory challenges; *Batson* claim upheld because the proffered explanation was not race neutral ("I'm not going to excuse anything other than white people. That's just my policy.")).

People v. Battle, 308 A.D. 2d 597, 765 N.Y.S. 2d 251 (App. Div. 2d Dept. 2003) (two disputed peremptory challenges; prosecutor's explanation insufficient because it "amounted to little more than a denial of discriminatory purpose.").

People v. Burroughs, 744 N.Y.S. 2d 608 (App. Div. 4th Dept. 2002) (one disputed peremptory challenge; *Batson* claim upheld because the proffered explanation was not related to the parties or issue in the case and because the challenging party had failed to question the challenged juror about the problem of possible bias stated in the proffered explanation).

People v. Campos, 290 A.D. 2d 456, 738 N.Y.S. 2d 108 (App.Div. 2d Dept. 2002) (two disputed peremptory challenges; *Batson* claim upheld because the proffered explanation was not related to the parties or issue in the case).

People v. Chapman, 295 A.D. 2d 359, 744 N.Y.S. 2d 42 (App. Div. 2d Dept. 2002) (four disputed peremptory challenges (finding of *prima facie* case was based on the first three); *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race and because the explanation was based on a characterization of the challenged juror that was not supported by the record).

People v. Chin, 771 N.Y.S. 2d 158 (App. Div. 2d Dept. 2004) (three disputed peremptory challenges; *Batson* claim upheld because explanation was "pretextual").

People v. Coleman, 292 A.D. 2d 461, 738 N.Y.S. 2d 877 (App. Div. 2d Dept. 2002) (one disputed peremptory challenge; *Batson* claim upheld because explanation was "pretextual").

People v. Davis, 308 A.D. 2d 343, 674 N.Y.S. 2d 184 (App. Div. 1st Dept. 2003) (one disputed peremptory challenge; *Batson* claim upheld because the proffered explanation was not race neutral).

People v. Duarte, 300 A.D. 2d 159, 751 N.Y.S. 2d 734 (App. Div. 1st Dept. 2002) (one disputed peremptory challenge; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race or gender).

People v. Haggard, 332 Ill. App. 3d 46, 772 N.E. 2d 829 (Ill. App. 1st Dist. 2002) (five disputed peremptory challenges; *Batson* claim upheld because the explanation was based on a characterization of the challenged juror that was not supported by the record).

People v. Henry, 309 A.D. 2d 717, 766 N.Y.S. 2d 551 (App. Div. 1st Dept.) (one disputed peremptory challenge; statement in question by juror actually favored the party exercising the peremptory challenge against the juror).

People v. Jenkins, 302 A.D. 2d 247, 756 N.Y.S. 2d 151 (App. Div. 1st Dept. 2003) (three disputed peremptory challenges; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race and because the explanation was based on a characterization of the challenged juror that was not supported by the record).

People v. Johnson, 196 Misc. 2d 417, 765 N.Y.S. 2d 199 (Sup. Ct. 2003) (three disputed peremptory challenges by defendant; six disputed peremptory challenges by prosecutor; *Batson* challenges for both sides upheld on ground that the explanations were "pretextual.")

People v. Jones, 297 A.D. 2d 256, 746 N.Y.S. 2d 596 (App. Div. 1st Dept. 2002) (two disputed peremptory challenges; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race).

People v. Lawson, 300 A.D. 319, 750 N.Y.S. 2d 777 (App. Div. 2d Dept. 2002) (one disputed peremptory challenge; *Batson* claim upheld because the explanation was either not racially neutral or was pretextual.)

People v. Leaym, 2003 WL 21079821 (Mich. App.) (one disputed peremptory challenge; *Batson* claim upheld because the explanation was based on a characterization of the challenged juror that was not supported by the record).

People v. Lozado, 303 A.D. 2d 270, 755 N.Y.S. 2d 611 (App. Div. 1st Dept. 2003) (three disputed peremptory challenges; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race).

People v. Miller, 298 A.D. 2d 194, 748 N.Y.S. 2d 50 (App. Div. 1st Dept. 2002) (unknown number of disputed peremptory challenges; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race).

People v. Muhammad, 108 Cal. App. 4th 313, 133 Cal. Rptr. 308 (Cal. App. 2d Dist. 2003) (at least six disputed peremptory challenges; *Batson* claim upheld because the trial court found the proffered reasons were pretextual because they were "intended to disguise the actual reason for peremptory challenges: group bias.")

People v. Pacheco, 308 A.D. 2d 403, 764 N.Y.S. 2d 426 (App. Div. 1st Dept. 2003) (unknown number of disputed peremptory challenges; *Batson* claim upheld because explanation was "pretextual").

People v. Ramirez, 751 N.Y.S. 2d 248, 298 A.D. 413 (App. Div. 2d Dept. 2002) (one disputed peremptory challenge; defense counsel had used 11 of his 15 peremptory challenges against white jurors; *Batson* claim upheld because explanation was "pretextual").

People v. Sanford, 297 A.D. 2d 759, 747 N.Y.S. 2d 789 (App. Div. 2d Dept. 2002) (two disputed peremptory challenges; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race).

People v. Silva, 25 Cal. 4th 345, 106 Cal. Rptr. 93, 21 P. 3d 769 (2001) (at least five disputed peremptory challenges; *Batson* claim upheld because the explanation was based on a characterization of the challenged juror that was not supported by the record).

People v. Van Hoesen, 307 A.D. 2d 376, 761 N.Y.S.2d 404 (App. Div. 3d Dept. 2003) (four disputed peremptory challenges; *Batson* claim upheld because the proffered explanation was not race-neutral).

People v. Wesley, 2002 WL 1065567 (Cal. App. 2 Dist.) (five disputed peremptory challenges; *Batson* claim upheld because the challenging party had failed to question the challenged juror about the problem of possible bias stated in the proffered explanation, because one explanation concerned a statement by the juror that favored the challenging party, and because of racial pattern of challenges).

People v. Willis, 27 Cal. 4th 811, 43 P. 3d 130, 118 Cal. Rptr. 301 (2002) (fifteen disputed peremptory challenges; *Batson* claim upheld in part because challenger appeared to have engaged in "systematic" exclusion of whites).

Pryor v. Commonwealth, 2003 WL 21241881 (Ky. App.) (three disputed peremptory challenges; *Batson* claim upheld because explanation was "pretextual").

Rodriguez v. Schriver, 2003 WL 22671461 (S.D.N.Y. 2003) (three disputed peremptory challenges; *Batson* claim upheld because the proffered explanation was not national origin neutral and because the explanation was based on a characterization of the challenged juror that was not supported by the record).

Shelton v. State, 257 Ga. App. 890, 572 S.E.2d 401 (Ga. App. 2002) (three disputed peremptory challenges; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race and because the proffered explanation was not related to the parties or issue in the case).

Silas v. State, 847 So. 2d 899 (Miss. App. 2002) (five disputed peremptory challenges; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race).

State ex rel. Ballard v. Painter, 213 W.Va. 290, 582 S.E. 2d 737 (2003) (one disputed peremptory challenge; *Batson* claim upheld because the explanation was based on a characterization of the challenged juror that was not supported by the record).

State v. Chatwin, 58 P. 3d 867, 2002 UT App. 363 (Utah App. 2002) (one disputed peremptory challenge; *Batson* claim upheld because explanation for challenge to sole minority juror was not gender neutral.)

State v. Dunn, 831 So. 2d 862 (La. 2002) (eight disputed peremptory challenges; *Batson* claim upheld because the explanation was based on a characterization of the challenged juror that was not supported by the record).

State v. Harris, 820 So. 2d 471 (La. 2002) (two disputed peremptory challenges) (*Batson* claim upheld because the proffered explanation was not race neutral, because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race, because the challenging party had failed to question the challenged juror about the problem of possible bias stated in the proffered explanation, and because the explanation was based on a fact about the challenged juror that actually favored the party utilizing the challenge).

State v. Heckenlively, 83 S.W. 3d 560 (Mo. App. 2002) (five disputed peremptory challenges) (*Batson* claim upheld because the explanation was based on a characterization of the challenged juror that was not supported by the record and because of pattern of juror strikes).

State v. Jensen, 76 P. 3d 188 (Utah 2003) (two disputed peremptory challenges; *Batson* claim upheld because the proffered explanation was not gender neutral and because the challenging party had failed to question the challenged juror about the problem of possible bias stated in the proffered explanation).

State v. Lewis, 354 S.C. 222, 580 S.E. 2d 149 (S.C.App. 2003) (unknown number of disputed peremptory challenges; *Batson* claim upheld because the proffered explanation was not gender neutral).

State v. Marlowe, 89 S.W. 2d 464 (Mo. 2002) (one disputed peremptory challenge; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race and because the proffered explanation was not related to the parties or issue in the case).

State v. Shepherd, 839 So. 2d 1103 (La. App. 3 Cir. 2003) (five disputed peremptory challenges; *Batson* claim upheld because the proffered explanation was not related to the parties or issue in the case).

State v. Stewart, 2004 WL 135317 (La. App. 5 Cir.) (two disputed peremptory challenges; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race and because the explanation was based on a characterization of the challenged juror that was not supported by the record).

State v. Wade, 832 So. 2d 977 (La. App. 2 Cir. 2002) (seven disputed peremptory challenges; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race).

State v. Walker, 2002 WL 334179 (Ohio App. 1 Dist.) (one disputed peremptory challenge; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race).

State v. White, 859 So. 2d 751 (La.App. 2 Cir. 2003) (six disputed peremptory challenges; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race).

United States v. Ajayi, 67 Fed. Appx. 63, 2003 WL 21369262 (2d Cir.) (two disputed peremptory challenges; *Batson* claim upheld because trial court concluded that the proffered explanations were not "credible reasons.")

United States v. Alanis, 335 F. 3d 965 (9th Cir. 2003) (six disputed peremptory challenges; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different gender).

United States v. Bennett, 74 Fed. Appx. 201, 2003 WL 22048029 (3d Cir.) (nine disputed peremptory challenges; *Batson* claim upheld because trial judge rejected explanation as "farcical").

United States v. Chinnery, 68 Fed. Appx. 360, 2003 WL 21469342 (3d Cir.) (four disputed peremptory challenges; *Batson* claim upheld because challenger was unable to articulate race-neutral reason for two disputed challenges).

United States v. Wellington, 82 Fed. Appx. 828, 2003 WL 22952603 (4th Cir.) (four disputed peremptory challenges; *Batson* claim upheld because explanation was "pretextual").

U.S. Xpress Enterprises, Inc. v. J.B.Hunt Transport, Inc., 320 F. 3d 809 (8th Cir. 2003) (one disputed peremptory challenge; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race).

Walters v. Mitchell, 2002 WL 1751400 (E.D.N.Y.) (four disputed plaintiff peremptory challenges; five disputed defense peremptory challenges; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race, and because the challenging party had failed to question the challenged juror about the problem of possible bias stated in the proffered explanation).

Warwick v. Kuhlmann, 2003 WL 22047883 (S.D.N.Y.) (unknown number of disputed peremptory challenges; reason for sustaining *Batson* claim not stated).

Webb v. State, 2003 WL 22006006 (Miss. App.) (one disputed peremptory challenge; reason for sustaining *Batson* claim not stated).

Weddell v. Weber, 290 F.Supp. 2d 1011 (D.S.D. 2003) (one disputed peremptory challenge; prosecutor's statement that he just had a "gut feeling" that he did not want the juror was insufficient to satisfy the prosecution's burden at stage two).

White v. State, 257 Ga. App. 723, 572 S.E. 2d 70 (Ga. App. 2002) (twelve disputed peremptory challenges; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race).

Wilson v. State, 798 A. 2d 1042 (Del. 2002) (two disputed peremptory challenges; *Batson* claim upheld because explanation was "pretextual").

MAR 9 - 2005

No. 04-6964

IN THE SUPREME COURT OF THE UNITED STATES

JAY SHAWN JOHNSON, *Petitioner,*

v.

STATE OF CALIFORNIA, *Respondent.*

ON WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

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QUESTION PRESENTED

Whether to establish a prima facie case under *Batson v. Kentucky*, 476 U.S. 79 (1986), the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias?

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IN THE SUPREME COURT OF THE UNITED STATES

No. 04-6964

JAY SHAWN JOHNSON, *Petitioner,*

v.

STATE OF CALIFORNIA, *Respondent.*

OPINIONS BELOW

The first opinion of the California Court of Appeal, J.A. 59-113, is unofficially reported at 105 Cal. Rptr. 2d 727. The opinion of the California Supreme Court, J.A. 114-72, is reported at 30 Cal. 4th 1302, 71 P.3d 270, 1 Cal. Rptr. 3d 1. The order of this Court granting certiorari, J.A. 173, is reported at 540 U.S. 1045, and the Court's opinion dismissing the case, J.A. 174-78, is reported at 541 U.S. 428. The second opinion of the court of appeal, J.A. 179-214, is not reported. The order of the California Supreme Court denying review, J.A. 215, is not reported.

JURISDICTION

The order of the California Supreme Court denying discretionary review was entered October 20, 2004. The petition for a writ of certiorari was filed October 22, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment provides, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

STATEMENT

1. Petitioner, an African-American, murdered the Caucasian 19-month-old child of his girlfriend. J.A. 116, 148.

2. During jury selection, the prosecutor exercised twelve peremptory challenges, three of which were used to challenge all of the African-American prospective jurors, C.T., S.E., and R.L.[1] J.A. 116. Citing *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978), which held "'that the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates' the California Constitution," J.A. 119, petitioner objected after the challenge to S.E. and after the challenge to R.L, J.A. 116-17. Applying *Wheeler*'s requirement that the objector establish a prima facie case by showing a "strong likelihood" of group bias, the trial court denied the motions. J.A. 117-18.

3. A divided court of appeal reversed. J.A. 97. Following *Wade v. Terhune*, 202 F.3d 1190 (9th Cir. 2000), the court held the "strong likelihood" standard enunciated in *Wheeler*

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1. To suggest discriminatory intent, petitioner notes the prosecutor "challenged [S.E.] immediately after the trial court voir dired her" and challenged R.L. "immediately after her voir dire concluded." PBOM 3. As the California Supreme Court observed, "[T]his trial occurred in 1998, at a time the trial court had primary responsibility for conducting voir dire. The district attorney asked no questions of any prospective juror, including the nine of other ethnic groups he also challenged. Thus, asking no questions was of little or no significance here." J.A. 151-52 (citation omitted). Finally, the prosecutor's lack of response to petitioner's objection was appropriate. No response is required until the court finds a prima facie case. *J.E.B. v. Alabama*, 511 U.S. 127, 144-45 (1994).

violated *Batson v. Kentucky*, 476 U.S. 79, 94 (1986), which requires the objector to raise "an inference of discriminatory purpose." J.A. 65-72, 118. "Based primarily on its own comparison of answers the challenged jurors gave with answers of nonchallenged jurors, the court concluded that 'a prima facie case of group bias was established and that the judgment must therefore be reversed.'" J.A. 118-19.

4. The California Supreme Court reversed, "conclud[ing] that *Wheeler*'s terms, a 'strong likelihood' and a 'reasonable inference,' refer to the same test, and this test is consistent with *Batson*. Under both *Wheeler* and *Batson*, to state a prima facie case, the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias." J.A. 116. The court "also conclude[d] that *Batson* does not require state reviewing courts to engage in comparative juror analysis for the first time on appeal." *Id.* The court upheld "the trial court's finding that defendant failed to establish a prima facie case that the prosecutor used his peremptory challenges improperly." *Id.*[2]

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2. The trial court observed in connection with R.L. that it "had had 'concerns with regard to her qualifications in this matter based upon her answers on the questionnaire. . . . [S]he had a sister who had had drug charges'" and had "'difficulty understanding some of the issues.'" J.A. 117. The trial court had also been concerned about S.E., who in response to follow-up questions in court, but not on her questionnaire, disclosed a parent had been arrested for robbery thirty years ago, "expressed on the record that she didn't know if she could be fair," and had given an answer concerning her emotional response that "'may have caused concern for either side. Even though the answers tend to lean in favor of the prosecution in the case, neither side would want a juror deciding a case based upon emotions, rather than the facts and the evidence.'" J.A. 118. The supreme court saw "no basis on which to overturn the trial court's determinations." J.A. 148. As to C.T., about whom the trial court did not comment, likely because petitioner "did not argue that no reason existed to challenge" her, *id.*, the supreme court observed, "'(1) [S]he was childless (this case involved the death and alleged abuse of a minor), (2) the police had made no arrest after the robbery of her home five or six years ago, and (3) she omitted to answer the two questions in the questionnaire dealing with her opinions of

Two justices dissented based on a belief that *Wheeler*'s "strong likelihood" standard conflicts with *Batson* and that the correct standard is a "substantial danger" that challenges were discriminatory. J.A. 152-72.

5. This Court granted certiorari, J.A. 173, but concluded the judgment was not final and dismissed, J.A. 174-78.

6. The court of appeal resolved petitioner's remaining claims adversely to him and affirmed the judgment. J.A. 179-214. The supreme court denied review. J.A. 215.

SUMMARY OF ARGUMENT

The California Supreme Court held that to establish a prima facie case under *Batson v. Kentucky*, 476 U.S. 79 (1986), the objecting party must show that it is more likely than not that the other party's challenges, if unexplained, were based on impermissible group bias. That standard is correct for two reasons. First, the standard is inherent in a prima facie case that shifts the burden of production. Second, *Batson* did not constitutionally compel a lower standard. Petitioner asserts that the proper standard requires that the objector show a logical inference of discrimination. Although petitioner advances a variety of explanations in support of that standard and challenges the supreme court's reasoning, his arguments are not persuasive.

Batson requires that the objector demonstrate a prima facie case in order to shift the burden of production to the striking

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prosecuting and defending attorneys.'" *Id.* Petitioner is disturbed by the trial court's recitation of possible explanations for challenges to R.L. and S.E. and by the presentation and adoption on review of possible reasons for all the challenges. PBOM 4-6; *see* J.A. 117-18, 148. Trial courts cannot be faulted for not being persuaded by a showing offset by other information. And neither appellate counsel nor appellate courts can be faulted for relying on information in the record that supports a presumptively valid judgment. *People v. Wiley*, 9 Cal. 4th 580, 592 n.7, 889 P.2d 541, 548 n.7, 38 Cal. Rptr. 2d 347, 354 n.7 (1995).

party. It incorporated that requirement from the Court's Title VII cases. As a general principle of the law of evidence, a prima facie case that shifts the burden of production is one that entitles the moving party to relief unless the opposing party meets the shifted burden of production. The Court's Title VII cases reflect this understanding. The Court has stated that once a Title VII plaintiff has made a prima facie case and the burden of production has shifted, the factfinder must find for the plaintiff unless the defendant meets its burden of production. Similarly, as shown by the Court's disposition order in *Batson*, which remanded for the trial court to determine whether a prima facie case existed and to reverse if the prosecutor did not state race-neutral reasons, a party objecting to the use of peremptory challenges is entitled to relief if the striking party fails to meet its burden of production. For a moving party to be entitled to relief in the face of his opponent's silence, the moving party must have met its burden of persuasion, which typically is done by proving the ultimate facts by a preponderance of the evidence. The Title VII cases confirm the applicability of that burden to the requirement for a prima facie case with a shifting burden of production. When a Title VII plaintiff establishes a prima facie case, a presumption of discrimination arises. The presumption is appropriate because the Court has concluded that when the acts constituting a prima facie case have occurred and are unexplained, it is more likely than not that the acts were based on discriminatory intent. Thus, a Title VII plaintiff who presents a prima facie case that is unrebutted is entitled to relief. The plaintiff has shown that it is more likely than not that there was discrimination. Therefore, in order to prove a prima facie case of discrimination in a *Batson* hearing (thereby shifting the burden of production and entitling the objector to relief if the striking party is silent), the objecting party must show that it is more likely than not that the other party's challenges, if unexplained, were based on impermissible group bias.

The "more likely than not" standard is constitutional. Under state law, peremptory challenges are challenges for which no

reason need be given. When, under *Batson*, a court requires a striking party to state reasons for his peremptory challenges, the court trumps state law by finding it unconstitutional as applied. The effect is necessarily one of constitutional dimension because this Court lacks authority to create non-constitutional rules governing the state courts. As a foundational matter, a party seeking relief has the burden of proving the facts entitling the party to relief, which usually is accomplished by proving the facts by a preponderance of the evidence. A party who challenges a statute as being unconstitutional as applied usually would prove by preponderant evidence the facts demonstrating the asserted constitutional impairment. Thus, as the party claiming that the peremptory challenge statute is unconstitutional as applied, the party objecting under *Batson* has the burden of proving the fact of discrimination by a preponderance of the evidence in California.

Moreover, in setting standards for when trial courts must grant a request for voir dire on racial prejudice, the Court has rejected on constitutional grounds a standard akin to that advanced by petitioner. In an exercise of supervisory authority over federal criminal trials, the Court requires trial judges to grant a party's request for voir dire on racial prejudice when there is a reasonable possibility of prejudice. That standard, which is similar to the inference standard advocated by petitioner, does not apply to the States. The Constitution mandates inquiry only when there is a constitutionally significant likelihood of prejudice. The Court should not use a standard it already rejected on constitutional grounds for purposes of deciding when to question jurors about bias to determine when to question parties about bias.

California does not insist in this case that its "more likely than not" standard is constitutionally compelled. Petitioner can prevail only if its standard is prohibited. Consistent with principles of federalism, the Court largely left particularized standards implementing *Batson* to the States. Under California law, the default burden of persuasion is a preponderance of the evidence.

Petitioner's arguments are unavailing. He treats the term "prima facie case" as if it invariably refers to any inference that could support relief. The Court has repeatedly recognized, particularly in the Title VII cases, a different meaning, that of demonstrating an entitlement to relief such that the burden of production shifts. He imports into the term "inference" a persuasiveness threshold even though the term simply refers to a deduction of fact and even though the Court has, particularly in the Title VII cases, used it as a shorthand for when a party shows it is more likely than not the inferred fact existed. Using the mere inference test is inconsistent with the Court's voir dire cases, its favorable treatment of *Wheeler* in *Batson*, *Batson*'s description of factors in a prima facie case that go beyond mere logicality, and the Court's efforts to avoid unnecessarily disrupting voir dire. Petitioner emphasizes one definition of a prima facie case that encompasses establishing an inference on which relief could be based while largely ignoring the definition that encompasses presenting sufficient evidence to shift the burden of production and to entitle the party to relief if the other party offers no rebuttal. It is the latter that *Batson* adopted. Petitioner's assertion that no response is required eliminates the distinction between the two types of prima facie case. Petitioner argues that the inference test is appropriate because a discovery standard should apply. A *Batson* objection, however, is not a discovery motion. It is a merits motion based on evidence available to the objector in court, and discovery of information that is privileged or protected by the Sixth Amendment is not available on a mere inference. Petitioner claims other courts apply the inference test when most merely recite the term "inference" without analysis. Petitioner discusses no case that analyzes the appropriate burden in light of the nature of a prima facie case with a shifting burden of production, the Title VII cases, the constitutional necessity for invalidating state peremptory challenge laws based on improbable evidence of discrimination, the effect on privilege, and this Court's rejection in a due process context of a standard similar to the inference standard.

Using the standard advocated by petitioner potentially burdens the voir dire process as even improbable inferences of discrimination would require statements of reasons. Peremptory challenges would cease being peremptory, a result *Batson* rejected. The standard used in California guards against these abuses yet has been an historic bulwark against discrimination that has, time and again, led to inquiry into claimed violations.

ARGUMENT

I.

TO ESTABLISH A PRIMA FACIE CASE UNDER *BATSON* THE OBJECTOR MUST SHOW THAT IT IS MORE LIKELY THAN NOT THAT THE OTHER PARTY'S PEREMPTORY CHALLENGES, IF UNEXPLAINED, WERE BASED ON IMPERMISSIBLE GROUP BIAS

The United States and California Constitutions prohibit the use of race- or gender-based peremptory challenges during jury selection. Establishing the mechanism for evaluating claims that challenges were discriminatory was evolutionary, which led to different phrasings by this Court and the California Supreme Court of the test to determine the existence of a prima facie case of bias. The California Supreme Court referred to the obligation to show a "strong likelihood" of discrimination. *People v. Wheeler*, 22 Cal. 3d 258, 280, 583 P.2d 748, 764, 148 Cal. Rptr. 890, 905 (1978). This Court spoke of the obligation to "raise an inference" of discrimination. *Batson v. Kentucky*, 476 U.S. 79, 96 (1986). Petitioner asserts that California's articulation of the test is stricter than *Batson*'s. His argument fails, however, as he misapprehends the role "raising an inference" plays in establishing a prima facie case. Petitioner confuses the *method* of proving a prima facie case by way of inference and the *burden of proof* on the objector to demonstrate a prima facie case.

The issue is not what *facts* can lead to a deduction that there may have been discrimination but rather how *persuasive* the deduction must be before the trial court requires a statement of reasons. The supreme court below engaged in a thorough analysis, concluded the different phrases did not establish different burdens, and correctly identified the burden as being to show that it is more likely than not that the challenges, if unexplained, were based on impermissible group bias.

California strongly disputes at the outset the implication of petitioner that the California standard makes it easier for a party to discriminate than the standard he proposes. It was California's landmark *Wheeler* decision that rejected the "virtually impossible" showing required by this Court's decision in *Swain v. Alabama*, 380 U.S. 202 (1965), and permitted—for the first time anywhere—a party to show discrimination in jury selection on a case-by-case basis. *Batson* did not reject *Wheeler*; it embraced it. Petitioner, and the Ninth Circuit, misread *Batson* as endorsing a "reasonable inference" test. This is no test at all. Or, more precisely, it is a test with such a low threshold as to disrupt voir dire, infringe on the State's interest in its peremptory challenge scheme, and interfere with the striking party's significant (sometimes constitutional) interest in preserving work-product and attorney-client privileges even where it is more probable than not that the striking party was not engaging in discriminatory jury selection. *Batson* does not sanction such a test, which can lead to abusive motions and delays in jury selection. The California Supreme Court's historic *Wheeler* standard has served litigants well in rooting out discrimination and avoiding those adverse consequences. And it has not precluded trial courts from recognizing prima facie cases, as even a limited review of California Supreme Court cases demonstrates.[3/] Petitioner presents no

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3. *See, e.g., People v. Reynoso*, 31 Cal. 4th 903, 910-11, 74 P.3d 852, 856, 3 Cal. Rptr. 3d 769, 775 (2003); *People v. Catlin*, 26 Cal. 4th 81, 116, 26 P.3d 357, 378, 109 Cal. Rptr. 2d 31, 56 (2001); *People v. Silva*, 25 Cal. 4th 345, 384, 21 P.3d 769, 795, 106 Cal. Rptr. 2d 93, 124 (2001); *People v.*

persuasive reason to reject *Wheeler* and certainly fails to show that its standard violates the Constitution.

A. Evolution Of The Prima Facie Case Requirement

1. In *Swain*, 380 U.S. 202, this Court concluded that it is permissible to insulate from inquiry the removal of Negroes from a particular jury on the assumption that the prosecutor is acting on acceptable considerations . . . . But when the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes . . . with the result that no Negroes ever serve on petit juries, the Fourteenth Amendment claim takes on added significance. . . . If the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecutor may well be overcome.

Id. at 223-24.

2. In *Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890, the California Supreme Court rejected *Swain*. Concluding that "[i]t demeans the Constitution to declare a fundamental

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Ervin, 22 Cal. 4th 48, 75, 990 P.2d 506, 519, 91 Cal. Rptr. 2d 623, 638 (2000); *People v. Williams*, 16 Cal. 4th 153, 187, 940 P.2d 710, 734, 66 Cal. Rptr. 2d 123, 147 (1997); *People v. Williams*, 16 Cal. 4th 635, 662, 941 P.2d 752, 768, 66 Cal. Rptr. 2d 573, 589 (1997); *People v. Jones*, 15 Cal. 4th 119, 159, 931 P.2d 960, 984-85, 61 Cal. Rptr. 2d 386, 411 (1997), *overruled on other grounds by People v. Hill*, 17 Cal. 4th 800, 823, n.1, 952 P.2d 673, 684 n.1, 72 Cal. Rptr. 2d 656, 667 n.1 (1998); *People v. Alvarez*, 14 Cal. 4th 155, 194, 926 P.2d 365, 388, 58 Cal. Rptr. 2d 385, 408 (1996); *People v. Jackson*, 13 Cal. 4th 1164, 1196, 920 P.2d 1254, 1269, 56 Cal. Rptr. 2d 49, 64 (1996); *People v. Sims*, 5 Cal. 4th 405, 428-29, 853 P.2d 992, 1004, 20 Cal. Rptr. 2d 537, 549 (1993); *People v. Pride*, 3 Cal. 4th 195, 230 & n.10, 833 P.2d 643, 662 & n.10, 10 Cal. Rptr. 2d 636, 655 & n.10 (1992).

personal right under that charter and at the same time make it virtually impossible for an aggrieved citizen to exercise that right," the court held that *Swain* "is not to be followed in our courts." *Id.* at 287, 583 P.2d at 768, 148 Cal. Rptr. at 909-10. Instead, "all claims in California courts that peremptory challenges are being used to strike jurors solely on the ground of group bias are to be governed" by the state constitution's representative-cross-section requirement and a new evidentiary procedure. *Id.*, 583 P.2d at 768, 148 Cal. Rptr. at 910.

In establishing that procedure, the California Supreme Court sought to "define a burden of proof which a party may reasonably be expected to sustain in meritorious cases, but which he cannot abuse to the detriment of the peremptory challenge system." *Id.* at 278, 583 P.2d at 763, 148 Cal. Rptr. at 904. The court held that "[i]f a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he must raise the point in timely fashion and make a prima facie case of such discrimination to the satisfaction of the court." *Id.* at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905. To do that "he must show a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias." *Id.* If there is "a reasonable inference . . . that peremptory challenges are being used on the ground of group bias alone," that is, if "a prima case has been made, the burden shifts to the other party to show if he can that the peremptory challenges in question were not predicated on group bias alone." *Id.* at 281, 583 P.2d at 764-65, 148 Cal. Rptr. at 906.

3. In *Batson*, 476 U.S. 79, after the Kentucky Supreme Court declined to follow *Wheeler*, *id.* at 84, this Court recognized that *Swain* had imposed a "crippling burden of proof" and "reject[ed] [its] evidentiary formulation as inconsistent with standards that have been developed since *Swain* for assessing a prima facie case under the Equal Protection Clause," *id.* at 92-93. Instead, "a defendant may establish a prima face case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of

peremptory challenges at the defendant's trial." *Id.* at 96.

The defendant must show that the facts and circumstances of the challenges "raise an inference that the prosecutor used [peremptory challenges] to exclude veniremen from the petit jury on account of their race." *Id.* "Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Id.* at 97. "The trial court then will have the duty to determine if the defendant has established purposeful discrimination." *Id.* at 98. *Batson* looked to the Court's Title VII cases, which "explained the operation of prima facie burden of proof rules." *Id.* at 94 n.18

4. Fourteen years later, the Ninth Circuit Court of Appeals concluded that *Wheeler* was incompatible with *Batson*. *Wade v. Terhune*, 202 F.3d 1190 (9th Cir. 2000). The court of appeals reasoned that "unlike the *Batson* Court, which required only that the defendant 'raise an inference' of discrimination, the *Wheeler* Court demanded that the defendant 'show a strong likelihood' that the prosecutor had excluded venire members from the petit jury on account of their race." *Id.* at 1195-96. "The California Supreme Court now routinely insists, despite *Batson*, that a defendant must show a 'strong likelihood' of racial bias." *Id.* at 1197. "[T]he *Wheeler* 'strong likelihood' test for a successful *prima facie* showing of bias is impermissibly stringent in comparison to the more generous *Batson* 'inference' test" and "therefore . . . California courts in following the 'strong likelihood' language of *Wheeler* are not applying the correct legal standard for a *prima facie* case under *Batson*." *Id.* Based on its belief that California courts apply the wrong standard, *Wade* held that it "need not—indeed, should not—give deference [under the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d),] to their determination that a defendant has failed to establish a *prima facie* case of bias." *Id.*

5. In this case, the California Supreme Court rejected *Wade*. After considering *Batson*, the nature of the requirement for a prima facie case that shifts the burden of production, and this

Court's Title VII cases, the court held that under *Batson* and *Wheeler* "to state a prima facie case, the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias." J.A. 135.

B. By Implementing A Prima Facie Case Requirement With A Shifting Burden Of Production As In Title VII Cases, *Batson* Incorporated The "More Likely Than Not" Standard

The "more likely than not" standard necessarily follows from *Batson*'s adoption of an evidentiary mechanism involving a prima facie case with a shifting burden of production and a nonmoving burden of persuasion. *See Purkett v. Elem*, 514 U.S. 765, 767-68 (1995) (describing the three-step *Batson* process as involving a shifting burden of production and nonmoving burden of persuasion). That evidentiary mechanism in general and as construed in this Court's Title VII cases in particular (on which *Batson* relied) requires not simply that the party making a prima facie case present evidence allowing an inference but rather that the moving party present evidence such that "if she stops *and her adversary does nothing*, her victory (so far as it depends on having the inference she desires drawn) is at once proclaimed." 2 J. Strong, *McCormick on Evidence* § 338 at 421 (5th ed. 1999) (emphasis added); *accord*, *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509-10 (1993). A showing sufficient to shift the burden of production, i.e., to warrant relief absent rebuttal, requires that the ultimate facts be proved by a preponderance.

1. "What is *prima facie* evidence of a fact?" *Kelly v. Jackson*, 31 U.S. (6 Pet.) 622, 632 (1832). Justice Story answered that question in 1832:

> It is such as, in judgment of law, is sufficient to establish the fact; and, if not rebutted, remains sufficient for the purpose. The jury are bound to con-

> sider it in that light, unless they are invested with authority to disregard the rules of evidence, by which the liberty and estate of every citizen are guarded and supported. No judge would hesitate to set aside their verdict and grant a new trial, if, under such circumstances, without rebutting evidence, they disregarded it. It would be error on their part, which would require the remedial interposition of the court. In a legal sense, then, such *prima facie* evidence, in the absence of all controlling evidence, or discrediting circumstances, becomes conclusive of the fact; that is, it should operate upon the minds of the jury as decisive to found their verdict as to the fact. Such we understand to be the clear principles of law on this subject.

Id.

That explanation retains its vitality 173 years later. "[W]hen the party with the burden of persuasion establishes a prima facie case supported by 'credible and credited evidence,' it must either be rebutted or accepted as true." *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 280 (1994).

Wigmore explained that the term "'prima facie case' is used in two senses." 9 J. Wigmore, *Evidence in Trials at Common Law* § 2494 at 378 (J. Chadbourn rev. ed., 1981). Although one meaning of "prima facie case" applies "where the proponent, having the first duty of producing some evidence in order to pass the judge to the jury, has fulfilled that duty, satisfied the judge, and may properly claim that the jury be allowed to consider his case," 9 *id.* at 379, there is another meaning:

> [T]he term is . . . applied to the stage of the case . . . where the proponent, having the burden of proving the issue (i.e., the risk of nonpersuasion of the jury), has not only removed by sufficient evidence the duty of producing evidence to get past the judge to the jury, but has gone further, and, either by means of a presumption or *by a general mass of strong evidence, has entitled himself to a ruling that the opponent should fail if he does nothing more in the way of producing evidence.*

Id. (emphasis added).

Thus, in order for the burden of production to shift, the party having the original burden of production and the burden of persuasion must make a prima facie showing entitling that party to relief absent introduction of rebutting evidence.

2. Two facets of *Batson* demonstrate that it implemented this generally understood evidentiary process and incorporated the requirement for a prima facie case that shifts the burden of production after a showing of entitlement to relief.

First, *Batson* held that if the striking party fails to shoulder the shifted burden of production, the objecting party should prevail. *Batson*, 476 U.S. at 100 ("If the trial court decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed."); *Hernandez v. New York*, 500 U.S. 352, 375-76 (1991) (Stevens, J., dissenting) ("By definition . . . a prima facie case is one that is established by the requisite proof of invidious intent. Unless the prosecutor comes forward with an explanation for his peremptories . . . to rebut that prima facie case, no additional evidence of racial animus is required to establish an equal protection violation."). The disposition in *Batson* is thus predicated on a prima facie case entitling the objecting party to relief.

Second, the Court modeled the *Batson* requirement for a prima facie case with a shifting burden of production on its Title VII cases. *Batson* observed, "Our decisions concerning 'disparate treatment' under Title VII of the Civil Rights Act of 1964 have explained the operation of prima facie burden of proof rules." *Batson*, 476 U.S. at 94 n.18 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981); *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983)); *see also Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003); *Pur-*

kett, 514 U.S. at 768-69; *Hernandez*, 500 U.S. at 359, 364-65 (plurality opinion). Those cases demonstrate that a prima facie case is one that is so persuasive it entitles the party with the burden of persuasion to relief if the opposing party does not meet the shifted burden of production.

McDonnell Douglas, 411 U.S. 792, explained, "The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination."[4] *Id.* at 802. "The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* The complaining party is then "afforded a fair opportunity to show that [the employer's] stated reason for [the employee's] rejection was in fact pretext," *id.* at 804, "a coverup for a racially discriminatory decision," *id.* at 805. If the defendant in a Title VII case does not meet the shifted burden of production, the plaintiff is entitled to relief.

> Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.

Burdine, 450 U.S. at 254; *see also St. Mary's Honor Center*, 509 U.S. at 509-10 & n.3 (concluding that if the factfinder in a Title VII case finds a prima facie case and the defendant has not met its burden, the factfinder "*must* find the existence of the presumed fact of unlawful discrimination and *must*, therefore, render a verdict for the plaintiff").

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4. This is typically done "by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *Id.* at 802.

3. Because a prima facie case shifts the burden of production and entitles the plaintiff to a finding in its favor if its evidence is not rebutted, that party must prove its prima facie case by a preponderance of the evidence. As explained in *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978),

> *McDonnell Douglas* did make clear that a Title VII plaintiff carries the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that *it is more likely than not* that such actions were "based on a discriminatory criterion illegal under the Act."

Id. at 576 (emphasis added). "A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are *more likely than not* based on the consideration of impermissible factors." *Id.* at 577 (emphasis added). Thus, the prima facie showing "is simply proof of actions taken by the employer from which we infer discriminatory animus because experience has proved that in the absence of any other explanation *it is more likely than not* that those actions were bottomed on impermissible considerations." *Id.* at 579-80 (emphasis added). As *Burdine* recognized, the "burden of establishing a prima facie case of disparate treatment is not onerous," but "the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination." 450 U.S. at 252-53. *See also* 1 J. Weinstein & M. Berger, *Weinstein's Federal Evidence* § 301.02[3][a] (2d ed. 1997) ("[T]he presumed facts in most civil cases must be proved by a preponderance of the evidence.").

After making a prima facie case, the Title VII plaintiff and the *Batson* objector are in the same position and are entitled to victory, absent rebuttal, based on the same evidentiary mechanism—a prima facie case with a shifted and unmet burden of production. Their initial burden is therefore the same.[5]

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5. Although the prima facie case burden and effect are the same under

Batson necessarily incorporated the "more likely than not" standard when it established an evidentiary mechanism that (1) was based on the Title VII cases, (2) mandates a prima facie case before the burden of production shifts, and (3) entitles the objector to prevail if no rebutting evidence is presented. The state supreme court, therefore, properly identified the prima facie case burden as requiring the objecting party to show that it is more likely than not that the challenges, if explained, were made for discriminatory reasons.

C. *Batson* Did Not Declare A Constitutional Requirement For A Prima Facie Burden Lower Than "More Likely Than Not"

1. Requiring a statement of reasons from the striking party invalidates as applied the peremptory challenge statute, which in California provides that "no reason needs to be given for a

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Batson and Title VII, the parties' awareness that the burden has been satisfied is different. In a Title VII case,

> the *effect* of failing to produce evidence to rebut the [*McDonald Douglas*] presumption is not felt until the prima facie case has been *established*, either as a matter of law (because the plaintiff's facts are uncontested) or by the factfinder's determination that the plaintiff's facts are supported by a preponderance of the evidence. . . . As a practical matter . . . and in the real-life sequence of a trial, the defendant *feels* the "burden" not when the plaintiff's prima facie case is *proved*, but as soon as evidence of it is *introduced*. The defendant then knows that its failure to introduce evidence of a nondiscriminatory reason will cause judgment to go against it *unless* the plaintiff's prima facie case is held to be inadequate in law or fails to convince the factfinder.

St. Mary's Honor Center, 509 U.S. at 510 n.3. Under *Batson*, however, reasons need not be stated until the trial judge as factfinder determines that a prima facie case has been made. *J.E.B.*, 511 U.S. at 144-45. This difference is appropriate. In the latter context, requiring the trial judge sitting as a factfinder to make a finding on the prima facie case before the striking party must give reasons preserves the peremptory challenge statute and protects against meritless motions.

peremptory challenge." Cal. Civ. Proc. Code § 226(b) (West 1982 & Supp. 2005). *See Wheeler*, 22 Cal. 3d at 281 n.28, 583 P.2d at 765 n.28, 148 Cal. Rptr. at 906 n.28 (statute "must give way to the constitutional imperative: the statute is not invalid on its face, but in these limited circumstance it would be invalid as applied if it were to insulate from inquiry a presumptive denial of the right to an impartial jury"). The effect of a prima facie showing cannot be other than as-applied constitutional invalidity of the State's law. Federal courts lack authority to adopt nonconstitutional rules for the States. *Dickerson v. United States*, 530 U.S. 428, 438-39 (2000).

It is the "general rule that one seeking relief bears the burden of demonstrating that he is entitled to it." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984). Moreover, "[i]t is fundamental that the judicial power to declare legislative action invalid upon constitutional grounds is to be exercised only in clear cases. The constitutional invalidity must be manifest and if it rests upon disputed questions of fact, the invalidating facts must be proved." *Minnesota Rate Cases*, 230 U.S. 352, 452-53 (1913).

In *Batson*, the "invalidating fact[]" of discriminatory intent is that the challenges were exercised "on account of [the juror's] race." 476 U.S. at 89. If, after the objecting party's showing, more than likely the peremptory challenge did *not* violate the Constitution, the objector fails to meet his burden of demonstrating entitlement to relief were the challenge unexplained and certainly has not "proved" such "invalidating facts" as would show "manifest" "constitutional invaldity." *Minnesota Rate Cases*, 230 U.S. at 452-53.

2. The nonconstitutionally compelled nature of the inference standard advocated by petitioner and the propriety of California's "more likely than not standard" are demonstrated by comparing those standards to the standards applied to determining when the trial court is required to conduct voir dire about racial prejudice. The mere inference standard advocated by petitioner is akin to a standard already rejected on constitutional grounds by this Court.

No per se rule requires a trial judge to inquire about a prospective juror's racial prejudice whenever such questioning is sought. *Ristaino v. Ross*, 424 U.S. 589, 596 n.8 (1976). Rather, on request, a state judge must inquire about racial prejudice when there is "a *constitutionally significant likelihood* that, absent questioning about racial prejudice, the jurors would not be as 'indifferent as [they stand] unsworne.'" *Id.* at 596 (emphasis added). Thus, in *Ham v. South Carolina*, 409 U.S. 524 (1973), "circumstances . . . *strongly suggested* the need for *voir dire* to include specific questioning about racial prejudice." *Ristaino*, 424 U.S. at 596 (emphasis added).

> Ham's defense was that he had been framed because of his civil rights activities. . . . Racial issues therefore were inextricably bound up with the conduct of the trial. Further, Ham's reputation as a civil rights activist and the defense he interposed were likely to intensify any prejudice that individual members of the jury might harbor. In such circumstance we deemed a *voir dire* that included questioning specifically directed to racial prejudice, when sought by Ham, necessary to meet the constitutional requirement that an impartial jury be impaneled.

Id. at 596-97.

In *Ristaino*, an African-American "convicted in a state court of violent crimes against a white security guard," *id.* at 589, had requested that the trial court conduct voir dire on racial prejudice, *id.* at 590. The Court did not agree

> that the need to question veniremen specifically about racial prejudice also rose to constitutional dimensions in this case. The mere fact that the victim of the crimes alleged was a white man and the defendants were Negroes was less likely to distort the trial than were the special factors involved in *Ham*. . . . The circumstances thus did not suggest a *significant likelihood* that racial prejudice might infect Ross' trial.

Id. at 597 (footnote omitted) (emphasis added). Thus,

> [o]nly when there are more *substantial indications of the likelihood* of racial or ethnic prejudice affecting the jurors in a particular case does the trial court's denial of a defendant's request to examine the jurors' ability to deal impartially with this subject amount to an unconstitutional abuse of discretion. [¶] Absent such circumstances, the Constitution leaves it to the trial court, and the judicial system within which that court operates, to determine the need for such questions.

Rosales-Lopez v. United States, 451 U.S. 182, 190 (1981) (plurality opinion) (emphasis added); *see also id.* at 194-95 (Rehnquist, J., concurring in the result) (agreeing with most of plurality's reasoning). In rejecting the notion of inquiry in every case, *Ristaino* observed, "In our heterogeneous society policy as well as constitutional considerations militate again the divisive assumption—as a per se rule—that justice in a court of law may turn upon the pigmentation of skin, the accident of birth, or the choice of religion." 424 U.S. at 596 n.8.

This "constitutionally significant likelihood" test is more stringent than the test adopted under this Court's supervisory authority. In federal criminal trials, inquiry is required when "the total circumstances suggest a *reasonable possibility* that racial or ethnic prejudice will affect the jury." *Rosales-Lopez*, 451 U.S. at 192 (plurality opinion) (emphasis added). That test would, for example, have required inquiry in *Ristaino* had that case been tried in federal court. 424 U.S. at 597 n.9.

The inference test advocated by petitioner is equivalent to the "reasonable possibility" test applicable to federal criminal trials but constitutionally inapplicable to state criminal trials. It would be anomalous to conclude that a test that does not apply to state courts deciding whether to conduct voir dire of prospective jurors (who *are* the focus of the proceedings) must apply to state courts deciding whether to question parties exercising peremptory challenges (who most certainly are *not* the focus of the proceedings and who have a statutory right not to disclose the reasons for their challenges).

Nor should the divisive assumption *Ristaino* sought to avoid be fostered by adopting a test it rejected and creating the impression that officers of the court are discriminating when the objector's evidence of discrimination does not preponderate.

3. Petitioner can prevail only if California's standard is constitutionally *prohibited*. *Smith v. Robbins*, 528 U.S. 259, 284 (2000) ("'We address not what is prudent or appropriate, but only what is constitutionally compelled.'"). It is not. *Batson* made "no attempt to instruct [trial courts] how best to implement" its holding. 476 U.S. at 99 n.24. "The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." *Addington v. Texas*, 441 U.S. 418, 431 (1979); *see also Robbins*, 528 U.S. at 272 (noting "established practice of permitting the States, within the broad bounds of the Constitution, to experiment with solutions to difficult questions of policy"). Moreover, "it is normally 'within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion . . . .'" *Patterson v. New York*, 432 U.S. 197, 201 (1977).

As explained by the California Supreme Court below, "'Except as otherwise provided by law,' the default burden of proof in California is 'proof by a preponderance of the evidence.' Here, no other law has provided for a different standard." J.A. 133-34 (citations omitted).

Requiring preponderant evidence to establish a prima facie case is compatible with the Equal Protection Clause. That Clause is not violated by different definitions of the prima facie case burden but in the *exclusion* of a juror for discriminatory reasons. *See, e.g., Hernandez*, 500 U.S. at 359 (plurality opinion) ("departure from the normal course of proceeding" arising from prosecutor's stating reasons before trial court ruled on prima facie case "need not concern us"). "[T]he ultimate question [is] discrimination *vel non*." *Aikens*, 460 U.S. at 714. "*Batson* requires only that the prosecutor's reason for striking a juror not *be* the juror's race." *Hernandez*, 500 U.S.

at 375 (O'Connor, J., concurring). Under *Batson*, California is not precluded from requiring the objector at the prima facie case stage to show more likely than not that the peremptory challenges were made for discriminatory reasons.

D. Petitioner's Arguments Are Unavailing

Petitioner presents a variety of arguments against the standard articulated below, none of which is persuasive. An overarching theme is that because the issue involves racial discrimination and the Equal Protection Clause, a lower standard is appropriate. "'[T]he question facing triers of fact in discrimination cases is both sensitive and difficult. The prohibitions against discrimination . . . reflect an important national policy. . . . But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact.'" *St. Mary's Honor Center*, 509 U.S. at 524. The *Batson* procedure is simply a method of determining "a pure issue of fact." *Hernandez*, 500 U.S. at 364; *see also id.* at 372 (O'Connor, J., concurring).

1. a. Petitioner contends using a "more likely than not" prima facie case standard "undermines the whole meaning of *prima facie* case, which is to make a preliminary showing." PBOM 15. The assertion is circular and presupposes a barely logical inference regardless of its persuasive force satisfies the *Batson* prima facie case requirement. As shown above, a barely logical inference does not satisfy any prima facie case requirement that, like *Batson*'s, involves a shifting burden of production.

Nor does the preponderance standard "undermine[] the whole meaning of *prima facie* case." Since Justice Story's time, the term has been employed to mean a showing sufficiently persuasive that it entitles the party to victory absent rebuttal. *Kelly*, 31 U.S. (6 Pet.) at 632.

What would distort "the whole meaning of *prima facie* case" is eliding the clear difference between a prima facie case

without a shifting burden of production and a prima facie case *with* a shifting burden of production. That, essentially, is petitioner's approach under which a prima facie case sufficient to shift the burden of production arises when the party "adduce[s] evidence sufficient to permit an inference of discrimination." PBOM 21. But that is precisely what is required by a prima facie case requirement without a shifting burden of production. That version of a prima facie case arises when the party "having the first duty of producing some evidence in order to pass the judge to the jury, has fulfilled that duty." 9 Wigmore, *supra*, § 2494 at 379. Such a showing would avoid nonsuit or similar intervention preventing the case from going to the fact-finder. But it would not obligate the opposing party to produce evidence, i.e. it would not shift the burden of production. That occurs only when the first party "has *not only* removed by sufficient evidence the duty of producing evidence to get past the judge to the jury, but *has gone further*" and shown entitlement to relief. *Id.* (emphasis added).

Petitioner's argument thus collapses the two forms of a prima facie case into one. The practical effect of that analytic compression became apparent at oral argument last Term when petitioner asserted that the party to whom the burden of production shifted could remain silent but not necessarily suffer an adverse finding. Tr. (03-6539) 7. If that were so, no burden would have shifted to the second party.

Under petitioner's analysis, then, there is but one definition of a prima facie case—creating an inference sufficient to avoid an adverse ruling as a matter of law but not requiring any response from the opponent. Such a nonburden would require much rewriting of the law as it is well understood that "the penalty for not producing evidence when obliged to do so is nonsuit, dismissal, or adverse finding or when trial is by jury, directed verdict or adverse instruction to the jury." D. Louisell, *Construing Rule 301: Instructing the Jury on Presumptions in Civil Actions and Proceedings*, 63 Va. L. Rev. 281, 286 (1977). Obligation cannot so easily be transformed into option. *Cf. United States v. Citizens & S. Nat'l Bank*, 422

U.S. 86, 120 (1975) (after prima facie case of Clayton Act § 7 violation, it is "*incumbent* upon [defendant] to" rebut) (emphasis added); *Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (1st Cir. 1985) (affidavits in support of application to reopen deportation "made out a 'prima facie' case" where the "facts . . . if true, would show, *more probably than not*, that petitioner[]" was a refugee) (emphasis added); *Doug Hartley, Inc. v. NLRB*, 669 F.2d 579, 581 (9th Cir. 1982) ("[A] prima facie case . . . had been established, i.e., . . . the General Counsel *had shown* the union activities were 'a motivating factor' in their discharge. The Company then bore the burden of proving that the discharges would have been made in the absence of the employees' participation in any protected activity") (emphasis added); *NLRB v. Amber Delivery Serv., Inc.*, 651 F.2d 57, 68-69 (1st Cir. 1981) (after prima facie case of antiunion motive, burden of production shifted to "come forward with enough evidence to convince the trier of fact that, under the circumstances, there is no longer a *preponderance of the evidence* establishing a violation") (emphasis added).[6]

One case that would need to be reconsidered is *Purkett*. According to petitioner, if reasons *are not* given, "the trial judge still has to determine whether or not the objector has proven discrimination at that point, at stage three, by a preponderance of the evidence." Tr. (03-6539) 8. Yet according to *Purkett*, that duty arises when reasons *are* given. 514 U.S. at 767 ("*If* a race-neutral explanation is tendered, the trial court must *then* decide (step three) whether the opponent of the strike has proved purposeful racial discrimination." (Emphasis added).)

b. Petitioner attempts to bolster his circular argument by

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6. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401-03 (1983), disagreed with the First Circuit's approach, holding that because the employer presents an affirmative defense the burden of persuasion, not simply production, shifts. That case was later rejected to the extent it held under the Administrative Procedure Act the burden of persuasion shifts. *Greenwich Colliers*, 512 U.S. at 276-78.

contending the state supreme court "conflates steps one and three" of *Purkett* (establishing a prima facie case and meeting the ultimate burden of persuasion). PBOM 16. That is no more true here than it is in a Title VII case. That the court must determine whether there is discrimination at step three does not mean that the court does not determine whether the objector has shown discrimination at step one. Indeed, neither *Purkett* nor *Batson* states that persuasiveness is irrelevant at stage one. To the contrary, *Purkett* says that "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." 514 U.S. at 768. If the burden rests with the objector, that suggests the burden is present at stage one as much as at stage three. Indeed, only when there is preponderant evidence of discrimination at stage one does the court invalidate the peremptory challenge statute as applied such that the objector is entitled to prevail in the face of silence by the striking party at step two.

Petitioner's insistence that the first stage is not a merits stage is incorrect. It is necessarily a merits stage as only a merits finding entitles the objector to prevail in the face of the striking party's silence, as *Batson* compels. 476 U.S. at 100 (requiring reversal if the prosecutor "does not come forward with a neutral explanation for his action"); *Hernandez*, 500 U.S. at 375-76 (Stevens, J, dissenting.). Thus, although the burden of persuasion on the objector is the same at steps one and three, the steps nevertheless remain distinct because meeting the burden at step one simply shifts the burden of production. *After* neutral reasons for the challenges have been given by the striking party, the objector must overcome the reasons to *meet* his ultimate burden of persuasion. But if such reasons are not given, the objector is entitled to prevail because like the Title VII plaintiff, he already *has met* his burden of showing likely discrimination.

c. Petitioner also asserts the "more likely than not" standard improperly requires proof of discrimination "without allowing the objector to have access to the most important piece of information, which the objector would ordinarily use at step

three, namely, the prosecutor's purported reason." PBOM 16. Petitioner proceeds from a flawed and unstated premise—that the *type* of evidence available to the objector determines how *persuasive* the evidence must be. It does not. The burden of persuasion was set by the adoption of a prima facie case requirement that invalidates application of peremptory challenge statutes and shifts the burden of production to the striking party who will suffer an adverse ruling if that shifted burden is not met.

Moreover, it is counterintuitive to argue it is harder for the objector to show discrimination was more likely than not when the objector does not have the striker's reasons. Typically, reasons will undercut the objector's case. Not having to contend with unfavorable information does not work to the objector's disadvantage. Once reasons are given, the objector has the additional burden of showing they are false, by, for example, providing comparative analysis of the challenged and unchallenged jurors. *See* J.A. 136, 140-42, 146 (noting availability of comparative analysis by objector in trial court).

In any event, having and disproving the striking party's reasons for the challenges is not a necessary part of a prima facie case. The objector has a wealth of information at his disposal to demonstrate a prima facie case. "During jury selection, the entire *res gestae* take place in front of" the parties. *United States v. Armstrong*, 517 U.S. 456, 467 (1996). The objector can rely on factors such as the race or gender of the parties and key witnesses, the number of challenges exercised, the composition of the jury, the composition of the venire, the questions and answers during voir dire, and the demeanor of the venirepersons. The objector does not have the striking party's explanation for the challenges for the simple reason that he is not entitled to them. The challenges *are* peremptory, and the peremptory challenge statute is valid as applied until the objecting party establishes discrimination by preponderant evidence. At that point, the striking party is entitled to the reasons and can, at stage three, attempt to show they are false. Thus, it is petitioner who conflates steps one and three. Show-

ing reasons are pretextual is not part of the prima facie case; rather, such a showing is a way the objecting party meets his burden of persuasion at step three.

d. Petitioner asserts that his survey of 84 cases with a finding of discrimination shows that "[i]n the vast majority of these cases, that finding . . . turned on analysis of the challenger's stated reasons," PBOM 18, and "that the real purpose of a *prima facie Batson* finding is to allow the objector to obtain, and the trial court to hear, the challenger's reason," akin to a discovery motion, PBOM 19.

If that were the real purpose, then the preponderance test is more likely to accomplish the goal. Petitioner's position is internally inconsistent as it purports to ensure reasons will be given but rests on the premise that a striking party will not necessarily suffer an adverse finding if reasons are not provided. Given improbable evidence of discrimination, the striking party could safely conclude it would be better to remain silent and preserve trial strategy.

If the cases explained the "real purpose" of the test, presumably petitioner would have included the reasoning of the cases, not their result. But he discusses no case that adopts the permissive inference test after evaluating the nature of a prima facie case with a shifting burden of production and the invalidation of a state statute on improbable evidence.

But, that is not the "real purpose" of a prima facie case. Certainly, once reasons are given, they are important because typically "the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed." *Hernandez*, 500 U.S. at 365 (plurality opinion). But that does not suggest that the prima facie case burden is set at the level of bare logicality. It suggests the opposite—that race-neutral reasons are important because the objecting party has "gone further" and shown entitlement to relief by a preponderance. *See Hernandez*, 500 U.S. at 375 (Stevens, J.) ("By definition . . . a prima facie case is one that is established by the requisite proof of invidious intent.").

If reasons must be given, petitioner's standard undermines

the rule that the burden of persuasion never shifts from the objector. Given the importance of reasons, if improbable evidence were a prima facie case, the "distinction between [the burden of production] and the ultimate burden of persuasion—always an elusive distinction in practice—disintegrates completely." *United States v. Baker Hughes Inc.*, 908 F.2d 981, 991 (D.C. Cir. 1990).

Fundamentally, a *Batson* motion is not "akin to a discovery motion." PBOM 19. It is a *merits* motion. A *Batson* objector does not seek discovery to use in a later motion claiming the jury selection process violated equal protection. Instead, the objector directly claims an equal protection violation. His motion is not for discovery but to quash the venire or obtain other relief. *Batson*, 476 U.S. at 99-100 n.24; *People v. Willis*, 27 Cal. 4th 811, 43 P.3d 130, 118 Cal. Rptr. 2d 301 (2002).

As Justice Marshall, joined by Justice Brennan, observed, a party

> need not have made out a full prima facie case in order to be entitled to discovery. A prima facie case, of course, is one that if unrebutted will lead to a finding of selective prosecution. It shifts to the Government the burden of rebutting the presumption of unconstitutional action. But a defendant need not meet this high burden just to get discovery; the standard for discovery is merely nonfrivolousness.

Wayte v. United States, 470 U.S. 598, 625 (1985) (Marshall, J., dissenting) (citations omitted).

A showing of nonfrivolousness, i.e., the showing made by raising a barely logical inference, is insufficient to establish "a full prima facie case" that shifts the burden of production in a hearing on the merits of an equal protection claim. Rather, to create a prima facie case, shift the burden of production, and compel a response on pain of an adverse finding, the party seeking to establish a violation of the Equal Protection Clause most go beyond mere logicality and demonstrate entitlement to relief. When the striking party is required to respond, he does so not because the objecting party has propounded an interrog-

atory or request for admission but because the court has, by finding a prima facie case, informed the striking party that the burden of production in an evidentiary proceeding has shifted to him and that the court will enter an adverse finding on the merits of the motion unless he responds.

If *Batson* were a discovery device, petitioner's standard would still be inappropriate. Step two requires disclosure of opinion work product (if not communications protected by privilege and the Sixth Amendment). Unlike other work product, *opinion* work product "cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship." *Upjohn Co. v. United States*, 449 U.S. 383, 401 (1981). A "far stronger showing . . . would be necessary." *Id.* at 402. A barely logical inference is not "a showing of extraordinary circumstances" warranting discovery of opinion work product. 6 J. Moore, *Moore's Federal Practice* § 26.70[5][e] at 26-224 (3d ed. 2004).[7]

The "real purpose" of the prima facie case requirement, then, is not to provide discovery to the objecting party but to protect the peremptory challenge statute and privileged information until the probability of discrimination has been demonstrated so that the benefit of inquiry outweighs its cost.

e. Petitioner's table comparing the number of disputed challenges and the number of cases in which a prima facie case has been found, PBOM 20, is telling, but not for the reason he asserts. He claims that "the vast majority would not have met

7. Although he claims that requiring him to prove his case without such "discovery" would violate due process, petitioner's cited case, *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002), does not support him. It held that a Title VII complaint need not plead *McDonnell Douglas* facts and "instead must contain only a 'a short and plain statement of the claim showing that the pleader is entitled to relief'" to avoid dismissal. *Id.* at 508. It says nothing about due process requiring discovery. It certainly does not hold that a state privilege to withhold information can be overcome on due process grounds in a Title VII case. *Cf. Davis v. Alaska*, 415 U.S. 308, 319 (1974) (in *criminal* case, right to confrontation was "paramount to the State's policy of protecting a juvenile offender").

the California *prima facie* case standard as applied here, namely that no *prima facie* case was established, even though the prosecutor challenged all three black jurors." PBOM 20. Yet that assumes a certain number of challenges must constitute a prima facie case. In *Batson*, however, at the trial of a black defendant the prosecutor struck "all four black persons on the venire, and a jury composed only of white persons was selected." 476 U.S. at 83. If that were a prima facie case as a matter of law, the Court would presumably have so held rather than remanding to determine whether "the facts establish, prima facie, purposeful discrimination." *Id.* at 100.

Moreover, petitioner silently suggests California has a rule that challenging three minority jurors is never a prima facie case. Certainly the supreme court did not so hold here. What it did conclude was that viewing the circumstances of the case "in isolation, it certainly looks suspicious that all three African-American prospective jurors were removed from the jury. But viewing a case like this in isolation is all a reviewing court *can* do." J.A. 149; *see also People v. Childress*, 81 N.Y.2d 263, 267, 614 N.E.2d 709, 711, 598 N.Y.S.2d 146, 148 (1993) (disproportionate number of strikes rarely dispositive although "it may be indicative of an impermissible discriminatory motive"; striking two of three "not sufficient, on this record"). But that is not all an objector can do. He can marshal the evidence to show discrimination. J.A. 142; *Childress*, 81 N.Y.2d at 268, 614 N.E.2d at 712, 598 N.Y.S.2d at 149 (objector "should articulate and develop all of the [factual and legal] grounds").

The greater significance of the table is that 26 of the 81 cases, or nearly 33 percent, involved a challenge to a single juror. PBOM 20. If challenging one juror is enough to establish a prima facie case (and under petitioner's permissive inference test it is difficult to see why it would not suffice), then the prima facie case requirement serves no function. Each challenge creates a prima facie case and reasons must always be given. That result, however, effectively abolishes peremptory challenges, a step *Batson* refused to take. *Cf. Batson*, 476

U.S. at 107 (Marshall, J., concurring) (urging "eliminating peremptory challenges entirely in criminal cases").

2. Petitioner's principal contention, PBOM 21-28, echoes the Ninth Circuit's conclusion in *Wade v. Terhune*, 202 F.3d 1190 (9th Cir. 2000): *Batson* "required only that the defendant 'raise an inference' of discrimination," *id.* at 1195, and California's "strong likelihood" test "is impermissibly stringent in comparison to the more generous *Batson* 'inference' test," *id.* at 1197. The implicit premise in that argument—that the word "inference" set a burden of persuasion—is incorrect.[8]

a. That *Batson* spoke of the need to raise an inference is unsurprising. An inference "is '[a] process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted.'" *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 814 (1990) (Scalia, J., dissenting) (quoting Black's Law Dictionary 700 (5th ed. 1979)). Only by making inferences can the trial court determine whether the striking party in fact acted based on group bias. The Court's

8. Petitioner's assertion that "*Batson* cannot possibly mean that in order to *permit* an inference of discrimination, an objector must adduce evidence that *compels* a finding of discrimination," PBOM 23, assumes what he has not proved, that *Batson* requires only a permissive inference, and overstates the burden on the objector. His later references to the state supreme court's requiring a "'dispositive' inference of discrimination" or "a 'conclusive' inference," PBOM 29, rely on word transposition to inflate the burden recognized by that court. The court did not say that an objector must show a "dispositive inference" or a "conclusive inference." Rather, in a particular *appeal*, the court concluded that a certain factor (removal of all members of a group) "may have given rise to an inference" but may not have been "dispositive on this record," *People v. Sanders*, 51 Cal. 3d 471, 500, 797 P.2d 561, 576, 273 Cal. Rptr. 537, 552 (1990), and was "not conclusive," "[c]onsidering all the relevant circumstances," *People v. Howard*, 1 Cal. 4th 1132, 1156, 824 P.2d 1315, 1326, 5 Cal. Rptr. 2d 268, 279 (1992). It is not error for an appellate court to recognize that it is for the factfinder to choose among the available inferences. *Hernandez*, 500 U.S. at 369 (plurality opinion) ("'[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous'").

comments in *Oregon v. Kennedy*, 456 U.S. 667 (1982), concerning the process of determining whether a prosecutor intended to provoke a mistrial, apply:

> [A] standard that examines the intent of the prosecutor, though certainly not entirely free from practical difficulties, is a manageable standard to apply. It merely calls for the court to make a finding of fact. Inferring the existence or nonexistence of intent from objective facts and circumstances is a familiar process in our criminal justice system.

Id. at 675.

An inference by itself may be extremely probative, *see, e.g.*, *Barnes v. United States*, 412 U.S. 837, 845-46 (1973) (unexplained possession of recently stolen checks payable to persons unknown to defendant "permitted *the inference of guilt*" and "was clearly sufficient to enable the jury to find *beyond a reasonable doubt* that petitioner knew the checks were stolen") (emphasis added), or only minimally appealing, *see Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148 (2000) (in ADEA case under Title VII model, even if defendant gives false explanation to conceal something other than discrimination, prima facie case of the plaintiff and the falsity of the employer's justification will not always be sufficient to sustain a jury's finding of liability for plaintiff because the "'inference of discrimination will be weak or nonexistent'"). It may be so strong as to establish guilt, *see American Tobacco Co. v. United States*, 328 U.S. 781, 787 n.4 (1946) (noting need in criminal case for "'evidence from which the jury could properly find or *infer, beyond a reasonable doubt*,' that the accused is guilty") (emphasis added), or so weak that it merely permits the proponent to avoid a nonsuit.

To require an inference of discriminatory purpose is to require a method of producing evidence about the state of mind of a party. That evidence is available only by inference, i.e., the process of logical deduction, because no party exercising a challenge that is by definition peremptory would state a discriminatory purpose. The inference must still satisfy a persua-

siveness threshold. As the state supreme court observed, the definition of an inference "does not address . . . how strong the inference must be." J.A. 133 n.4.

b. The Court's use of the term "inference" in other contexts shows that *Batson*'s use of the term was not intended to set the prima facie case burden at the level of mere logicality regardless of the improbability of the inference. At a general level, the Court has recognized that "[a] common definition of 'finding of fact' is, for example, '[a] conclusion by way of reasonable inference from the evidence.'" *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 164 (1988). Thus, the use of the term "inference" in *Batson* accords with the requirement that sufficient evidence be presented to support a factual finding of discrimination such that the peremptory challenge statute may be found invalid as applied and the burden of production shifted onto the striking party.

More particularly, the Title VII cases demonstrate that the term "inference" in that context does not mean mere logicality without regard to persuasiveness but instead refers to a "more likely than not" showing. The Court has stated that Title VII requires a plaintiff to show an inference of illegal conduct:

> The importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate *to create an inference* that an employment decision was based on a discriminatory criterion illegal under the Act.

Teamsters v. United States, 431 U.S. 324, 358 (1977) (emphasis added). In raising the necessary "inference" to make a prima facie case, the plaintiff shows that the employment decision was more likely than not taken for discriminatory reasons. The plaintiff is therefore entitled to relief unless the defendant rebuts the prima facie case.

Thus, in *Furnco Construction Corp.*, 438 U.S. 567, the Court stated,

> *McDonnell Douglas* did make clear that a Title VII plaintiff carries the initial burden of showing actions taken by the employer *from which one can infer*, if such actions remain unexplained, that *it is more likely than not* that such actions were "based on a discriminatory criterion illegal under the Act."

Id. at 576 (emphasis added). "A prima facie case under *McDonnell Douglas raises an inference* of discrimination only because we presume these acts, if otherwise unexplained, are *more likely than not* based on the consideration of impermissible factors." *Id.* at 577 (emphasis added); *see also id.* at 579-80 (stating that the prima facie showing "is simply proof of actions taken by the employer *from which we infer* discriminatory animus because experience has proved that in the absence of any other explanation *it is more likely than not* that those actions were bottomed on impermissible considerations") (emphasis added).

In *Burdine*, 450 U.S. 248, the Court expressly rejected the notion that a prima facie case turns on a mere logical inference. The Court explained, "Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case." *Id.* at 254. Moreover, the Court (citing the same section of Wigmore as discussed above, although from an earlier edition) concluded,

> The phrase "prima facie case" not only may denote the establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue. 9 J. Wigmore, Evidence § 2494 (3d ed. 1940). *McDonnell Douglas* should have made it apparent that in the Title VII context we use "prima facie case" in the former sense.

Id. at 254 n.7.

Petitioner's reading the word "inference" as meaning mere logicality reduces the prima facie case requirement to "producing enough evidence to permit the trier of fact to infer the fact at issue." *Id. Burdine* specifically rejected that definition. *Batson* relied on the Title VII cases, including *Burdine*, in establishing the prima facie case requirement with its obligation to raise an inference of discrimination that shifts the burden of production. Furthermore, the disposition in *Batson* (remanding with directions to reverse if the prosecutor "does not come forward with a neutral explanation for his action," 476 U.S. at 100) necessarily precluded application of the mere inference standard advanced by petitioner. Under that standard, the Kentucky court on remand would have been free to find a prima facie case yet affirm the conviction even in face of prosecutorial silence. The Court does not adopt procedures that conflict with its remand orders. *Cf. Mickens v. Taylor*, 535 U.S. 162, 170-72, nn.3-4 (2002) (treating as dictum portion of opinion "inconsistent with the disposition" and that "simply contradicts the remand order"). *Batson*, therefore, did not adopt the very standard rejected in *Burdine*.

c. The inference standard advocated by petitioner is also inconsistent with the Court's treatment of the *Wheeler* standard, the factual showing necessary under *Batson*, and the Court's understanding of the role of voir dire.

Batson itself acknowledged the compatibility of *Wheeler*'s "strong likelihood" standard with the Court's holding. Citing *People v. Hall*, 35 Cal. 3d 161, 672 P.2d 854, 197 Cal. Rptr. 71 (1983) as an example, *Batson* noted, "In those States applying a version of the evidentiary standard we recognize today, courts have not experienced serious administrative burdens, and the peremptory challenge system has survived." 476 U.S. at 99 & n.23 (footnote omitted). In his concurrence, Justice Marshall observed, "Evidentiary analysis similar to that set out by the Court . . . has been adopted as a matter of state law in States including Massachusetts and California." *Id.* at 105 (Marshall, J., concurring).

Batson describes a prima facie case based on more than mere logicality or production of some evidence. *Batson* identified three components of a prima facie case: (A) "[T]he defendant first must show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race." *Batson*, 476 U.S. at 96 (citation omitted). (B) "[T]he defendant is entitled to rely on the fact . . . that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" *Id.* (C) "Finally, the defendant must show that these facts *and any other relevant circumstances* raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." *Id.* (emphasis added). If mere logicality were sufficient, *Batson* would have stated that factors (A) and (B) establish a prima facie case. A peremptory challenge that removes a member of the defendant's cognizable racial group through a practice that permits those who wish to discriminate to do so creates a logical inference of discriminatory intent. But *Batson* said "[t]his combination of factors . . . raises the necessary inference," *id.*, referring to all three. Factor (C) requires evidence that makes the inference not just logical but sufficiently persuasive as to shift the burden of production and compel a response and to warrant a finding adverse to the striking party if that party fails to meet the shifted burden of production.

The Court avoided a variety of problems in *Batson* by adopting the prima facie case requirement with a burden-shifting mechanism, which inherently involves establishing that a challenge was more likely than not for discriminatory reasons.

The "significant intrusion into the jury selection process" required by *Batson*, *see J.E.B.*, 511 U.S. at 147 (O'Connor, J, concurring), is fully justified when evidence of discrimination preponderates given the pernicious effect of discrimination on the justice system, *Johnson v. California*, 543 U.S. ___, ___ (2005) (slip op. 10). Requiring reasons in the face of improbable evidence of discrimination is not. Doing so will "increase

the possibility that biased jurors will be allowed on the jury" given that "the lawyer will often be unable to explain the intuition" about "which jurors are likely to be the least sympathetic." *J.E.B.*, 511 U.S. at 148 (O'Connor, J., concurring). Peremptory challenges would lose much of their peremptory nature if the evidentiary bar were set at the level of a logical inference. *Batson* obviously rejected Justice Marshall's position that peremptory challenges should be banned, a position based in part on his concern that a prima facie case requires a persuasive showing. *Batson*, 476 U.S. at 105 (Marshall, J., concurring) ("defendants cannot attack the discriminatory use of peremptory challenges at all unless the challenges are so flagrant as to establish a prima facie case"). The prima facie case requirement serves an important function under *Batson*, namely, to discourage meritless motions and to terminate *Batson* claims at the prima facie case stage (thereby preserving state law, the peremptory nature of the challenges, and trial strategy) when the objector has not made a persuasive showing that the striking party was acting unconstitutionally.[9]

Using logicality as the operative test could consume scarce judicial resources, probing the state of mind of the striking party rather than answering the legal and factual questions to be decided at trial. The purpose of voir dire is "to identify

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9. Of course, under state law, a prima facie could be established with a lesser showing. Florida abandoned the strong likelihood requirement and now requires inquiry "when an objection is raised that a peremptory challenge is being used in a racially discriminatory manner," *State v. Johans*, 613 So. 2d 1319, 1321 (Fla. 1993), "eliminat[ing] the requirement that the opponent of the strike make a prima facie showing of racial discrimination," *Melbourne v. State*, 679 So. 2d 759, 764 n.5 (Fla. 1996). Connecticut also recognized that *Batson* incorporated the "more likely than not" standard, *State v. Gonzalez*, 206 Conn. 391, 395-96, 538 A.2d 210, 212-13 (1988), but, under supervisory authority, requires reasons when a "defendant is a member of a cognizable racial group and the prosecutor exercises peremptory challenges to remove members of defendant's race from the venire," *State v. Holloway*, 209 Conn. 636, 645-46, 553 A.2d 166, 171-72 (1989).

unqualified jurors." *Morgan v. Illinois*, 504 U.S. 719, 729 (1992). The Court has cautioned against unnecessarily shifting the focus from establishing guilt of the defendant to guilt of the striking party: "It remains for the trial courts to develop rules, *without unnecessary disruption of the jury selection process*, to permit legitimate and *well-founded* objections to the use of peremptory challenges as a mask for race prejudice." *Powers v. Ohio*, 499 U.S. 400, 416 (1991) (emphasis added). "The analysis set forth in *Batson* permits prompt rulings on objections to peremptory challenges *without substantial disruption of the jury selection process*." *Hernandez*, 500 U.S. at 358 (plurality opinion) (emphasis added); *see also id.* at 374 (O'Connor, J., concurring) (cautioning against "unacceptable delays in the trial process" by "turning voir dire into a full-blown disparate impact trial" that "would be antithetical to the nature and purpose of the peremptory challenge"); *accord*, *Wheeler*, 22 Cal. 3d at 278, 583 P.2d at 763, 148 Cal. Rptr. at 904 (stating intent to "define a burden of proof which a party may reasonably be expected to sustain in meritorious cases, but which he cannot abuse to the detriment of the peremptory challenge system"); *id.* at 281, 583 P.2d at 764, 148 Cal. Rptr. at 906 (describing obligation of trial judge at prima facie stage "to distinguish a true case of group discrimination by peremptory challenges from a spurious claim interposed simply for purposes of harassment or delay").

Given societal understandings that race and gender matter, *Georgia v. McCollum*, 505 U.S. 42, 61 (1992) (Thomas, J., concurring); *J.E.B.*, 511 U.S. at 148 (O'Connor, J., concurring), and given that "peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate,'" *Batson*, 476 U.S. at 96, an inference (in the sense of the simple deduction of a fact from the existence of another fact) of discrimination could be hypothesized on nothing more than a black defendant challenging a white juror or a white prosecutor challenging a black juror. Race is one possible logical explanation. But the prospect that race is the reason for the challenge may be so remote that it

does not amount to a prima facie case.

Suggesting that the Federal Constitution invalidates peremptory challenge statutes nationwide on any inference of discriminatory purpose, no matter how weak, no matter how unlikely it appears to the trial judge, is to denigrate the importance of peremptory challenges to the selection of a qualified and unbiased jury, *see Batson*, 476 U.S. at 91 & n.15; *Holland v. Illinois*, 493 U.S. 474, 481-82 (1990), and the legislative choices of the several States, including California.

e. Petitioner offers a generic assertion that "inference" ordinarily refers to a permissive inference, which he distinguishes from a presumption. PBOM 23-24. Thus, he emphasizes Wigmore's description of the term "prima facie" as applying to the situation in which a party produces sufficient evidence to "'pass the judge to the jury.'" PBOM 23. Of course, the California Supreme Court recognized that sense of the term "prima facie." J.A. 130-31. It also recognized the other meaning, also identified by Wigmore, which involves a shifting burden of production. *Id.* "The difference between the two senses of the term [prima facie] is practically of the greatest consequence; for, in [one] sense, it means merely that the proponent is safe in having relieved himself of his duty of going forward, while in the [other] sense it signifies that he has further succeeded in creating it anew for his opponent." 9 Wigmore, *supra*, § 2494 at 381. It is the last described sense that *Batson*, with its shifting burden of production, necessarily adopted.

Petitioner also quotes *Ulster County Court v. Allen*, 442 U.S. 140, 157 (1979), where the Court recognized that a permissive inference "allows—but does not require—the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and which places no burden of any kind on the defendant. In that situation the basic fact may constitute prima facie evidence of the elemental fact." (Citation omitted.) The Court thus restated the passing-to-the-jury definition of "prima facie" articulated by Wigmore. But *Batson* necessarily adopted the other definition because, unlike the prima facie case

identified in *Allen*, "which places no burden of any kind" on the other party, the *Batson* prima facie case shifts the burden of production to the striking party.

Petitioner's reliance on *Armstrong*, 517 U.S. 456, is even less appropriate. There, the Court considered the standard to be met for a defendant to obtain discovery concerning selective prosecution from the Government. The Court reiterated that under "'ordinary equal protection standards,'" a claimant "must demonstrate" discriminatory effect and intent. *Id.* at 465. "'This is a matter of proof, and *no fact should be omitted to make it out completely*, when the power of a Federal court is invoked to interfere with the course of criminal justice of a State.'" *Id.* at 466-67 (emphasis in *Armstrong*). The Court recognized "that the showing necessary to obtain discovery should itself be a significant barrier to the litigation of insubstantial claims." *Id.* at 464. The "required threshold" is "a credible showing of different treatment of similarly situated persons." *Id.* at 470. Petitioner asserts, "When an objector initially makes a *Batson* motion, he similarly seeks discovery, namely, the purported reason for the peremptory challenge." PBOM 23. He reasons that if the *Armstrong* standard "is good enough" for selective prosecution discovery, it is "good enough" for *Batson* discovery. *Id.* As already explained, a *Batson* motion is not a discovery motion, it is a merits motion. The analogy to *Armstrong*, then, is not to its discussion of discovery but to its recognition that more is required for a merits showing than is required for discovery.

f. Petitioner claims the lower courts understand *Batson* as requiring merely an inference. He offers three cases that read *Batson* as rejecting strong likelihood or the preponderance standard: *Wade*, *King v. Moore*, 196 F.3d 1327, 1334 (11th Cir. 1999), and *Valdez v. People*, 966 P.2d 587, 590 (Colo. 1998). (Petitioner trumpets that the Ninth Circuit "in five opinions, decided by twelve different judges, appointed by four different presidents" concluded that California's prima facie test is unduly stringent. PBOM 24. Aside from the irrelevance of the number of judges or appointing Presidents, the

cases were decided after *Wade* by panels bound by *Wade*. *See Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc) (panel is bound by prior panel decision). Repeated application of (erroneous) circuit precedent is not significant.) All are conclusory; none analyzes the effect of a shifting burden of production, the Title VII cases, or the effect on the peremptory challenge statute. Petitioner's other authorities recite that an inference is required or existed without addressing the requisite persuasiveness of the inference. Repetition is no substitute for analysis.

Petitioner's assertion about regular application of the inference test, PBOM 25, is belied by the cases he cites. They articulate not one uniform "inference" test but a variety of tests. The lesson is not that the inference test is regularly applied but that the Third Circuit, Ninth Circuit, Eleventh Circuit, and California Supreme Court each have *different* tests for determining the existence of a prima facie case. Such differences are tolerated in *Batson*. *Batson*, 476 U.S. at 99 n.24.

Finally, petitioner asserts federal courts regularly find a prima facie case from two or more challenges that remove all or a majority of a "protected group." PBOM 28. Even if true, he presents no analysis from those cases about the proper burden at step one. And his "rule" perversely permits one "free" peremptory challenge notwithstanding the well-understood principle that a challenge to a single juror can violate equal protection. *See Batson*, 476 U.S. at 95. Petitioner does not articulate any logical barrier to mandating a finding whenever one minority juror is struck. Yet petitioner claims that Connecticut's standard, which requires a statement of reasons when a "defendant is a member of a cognizable racial group and the prosecutor exercises peremptory challenges to remove members of defendant's race from the venire," *Holloway*, 209 Conn. at 646 n.4, 553 A.2d at 172 n.4, is "distinctly lower than that which Petitioner proposes." PBOM 27 n.20. That assertion is further belied by his reliance on his case survey, in which 26 of the 81 cases involved a challenge to one juror. PBOM 20.

In any event, petitioner's count-the-strikes rule is invalid given *Batson*'s remand to determine as a *factual* matter whether striking all four black venirepersons in the trial of a black man was a prima facie case. 476 U.S. at 100; *see also Fernandez v. Roe*, 286 F.3d 1073, 1078 (9th Cir. 2002) ("Two challenges out of two venirepersons are not always enough to establish a *prima facie* case."); *United States v. Moore*, 895 F.2d 484, 486 (8th Cir. 1990) (seven blacks in venire; four of six challenges against blacks); *United States v. Dennis*, 804 F.2d 1208, 1209 (11th Cir. 1986) (per curiam) (three of five blacks).

Petitioner's counting-the-strikes approach demeans the individuality of the jurors and the striking party, reduces the trial judge to a practitioner of sets and numbers who classifies and counts the races and the strikes, and is inconsistent with the Court's insistence that the objecting party show discrimination from the facts and circumstances of voir dire. *Batson*, 476 U.S. at 96-97. It is *fact* finding, not *pattern* finding that is required. *Moore*, 895 F.2d at 485 (stating that it is "important that the defendant come forward with *facts*, not just numbers alone"). Petitioner discusses no case that rejects the "more likely than not" standard after considering the nature of a prima facie case that shifts the burden of production, the Court's Title VII cases, and the twin constitutional anomalies of invalidating a state statute on barely logical but improbable evidence of discrimination and of rejecting for purposes of questioning jurors a standard similar to that which he advances but using that standard to question parties.

3. Petitioner attacks the California Supreme Court's reasoning by asserting that the Title VII analogy is flawed. None of his arguments is persuasive.

a. Petitioner contends, "In a Title VII case a plaintiff emphatically is not required, in order to create a *prima facie* case, to show by a preponderance of the evidence that the employer engaged in discrimination." PBOM 32. Petitioner's understanding of the requisite burden of proof has changed and is incorrect. In his Petition for Certiorari in No. 03-6539 at 14-

15, he (correctly) acknowledged that the

> the quantum of proof needed to establish a prima facie case in employment cases is a preponderance of the evidence. This is true, (a) because the quantum of proof which establishes a prima facie case under Title VII must be sufficient to allow the plaintiff to win a judgment, and (b) because winning a judgment necessarily requires proof by a preponderance of the evidence.

Petitioner now believes "the *McDonnell Douglas* and *Furnco* test requires a permissive inference but no more. Under this standard, the burden on the plaintiff is to identify evidence which allows a court to 'infer' that discrimination occurred." PBOM 33 (footnotes omitted).

Petitioner relegates to a footnote discussion of the key language of *Furnco Construction Corp.*: "Under *Furnco Construction* the phrase 'more likely than not' does not describe the strength of the evidence needed to establish the plaintiff's inference. Instead, the phrase 'more likely than not' characterizes what the trier of fact may find if it accepts plaintiff's inference, namely, that discrimination was more likely than not." PBOM 33 n.26. That is contrary to the Court's precedent on the operation of presumptions in general and the *McDonnell Douglas* presumption in particular. "To establish a 'presumption' is to say that a finding of the predicate fact (here the prima facie case) produces a 'required conclusion in the absence of explanation' (here, the finding of unlawful discrimination)." *St. Mary's Honor Center*, 509 U.S. at 506. If the trier of fact in a Title VII case finds the four *McDonnell Douglas* prima facie case elements, there is a "required conclusion"—that there was discrimination. *Furnco Construction Corp.* explained that it was appropriate to require the fact-finder to conclude there was discrimination based on the *McDonnell Douglas* elements because "we presume these acts, if otherwise unexplained, are *more likely than not* based on the consideration of impermissible factors." 438 U.S. at 577 (emphasis added).

Petitioner's efforts to explain away footnote seven of *Burdine* are no more persuasive. To reiterate, there, the Court explained,

> The phrase "prima facie case" not only may denote the establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue. 9 J.Wigmore, Evidence § 2494 (3d ed. 1940). *McDonnell Douglas* should have made it apparent that in the Title VII context we use "prima facie case" in the former sense.

450 U.S. at 254 n.7. Petitioner posits, "[T]his footnote only concerns the *consequence* of creating a Title VII *prima facie* case, not the type or quantity of evidence needed to do so." PBOM 35. The "consequence" of establishing a legally mandatory, rebuttable presumption—requiring that a fact (discrimination) be presumed given the proof of the predicate facts (the *McDonnell Douglas* prima facie case elements)—is tenable only because the existence of the prima facie elements is more likely than not the product of the presumed fact. *Furnco Constr. Corp.*, 438 U.S. at 576-80; *cf. Leary v. United States*, 395 U.S. 6, 36 (1969) (criminal statutory presumption unconstitutional "unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend").

b. Petitioner contends the "sole purpose of that presumption is to compel the employer to articulate a reason." PBOM 36. There is no compulsion if, as petitioner asserted, the employer can remain silent and not necessarily lose. Tr. (03-6539) 7.

c. Petitioner asserts that "because a showing of 'strong evidence,' within the meaning of Wigmore §2494, is not needed to get a Title VII case to a jury, it would be nonsensical to require proof at that elevated level to establish the preliminary step of a *prima facie* case." PBOM 36. Not so. First, the role of a prima facie case in Title VII is not to determine whether sufficient evidence allows the case to go to the jury. That

question implicates the alternate sense of prima facie case described by Wigmore and expressly rejected by *Burdine*, 450 U.S. at 254 n.7.

Second, petitioner draws a false distinction between the "general mass of strong evidence," 9 Wigmore, *supra*, § 2494 at 379, and a presumption. The "general mass of strong evidence" and a presumption involve means of proof "differing widely in terms and appearance, but essentially the same in principle." 9 Wigmore, *supra*, § 2487 at 295. "In the ordinary case, this overwhelming mass of evidence, bearing down for the proponent, will be made up of a variety of complicated data, differing in every new trial and not to be tested by any set formulas." *Id.* This precisely describes a *Batson* hearing. "Another mode under which this process is carried out employs the aid of a fixed rule of law, i.e., *a presumption,* applicable to *inferences from specific evidence to specific facts forming part of the issue,* rather than to the general mass of evidence bearing on the proposition in issue." *Id.* This precisely describes the *McDonnell Douglas* inference. "The result is the same as in the preceding form of process . . . , i.e., the opponent loses as a matter of law, in default of evidence to the contrary . . . ." *Id.* Thus, "prima facie" "serves to subsume under one name the similar legal effects . . . produced by a specific presumption or by a ruling on the mass of evidence in the particular case." *Id.* § 2494 at 379.

c. Petitioner offers three reasons the *Batson* burden should be lower than the Title VII burden. First, he argues the Title VII evidence must be "strong enough to establish a presumption of discrimination, while the [*Batson* prima facie case evidence] do[es] not." PBOM 36. Aside from contradicting his assertion on the same page that "strong evidence" is not required in a Title VII case, the argument fails to appreciate that *in effect* a *Batson* prima facie case *does* create a presumption of discrimination. When "prima facie case" is "used to mean evidence so cogent as to require a particular conclusion in the absence of explanation, [it] has the probative effect of a presumption." Louisell, *supra*, at 291; *see* 9 Wigmore, *supra*, §

2494 at 379 ("the term 'prima facie' is sometimes used as *equivalent to the notion of a presumption*"). That is precisely the reason the striking party is required to give reasons. The presumption that the strikes were constitutional has been provisionally removed and the striking party will suffer an adverse finding (that he violated the Equal Protection Clause) unless he states reasons.[10/]

Petitioner's second and third reasons are the same idea under different names and merely reiterate his argument that *Batson* is a discovery mechanism. He is mistaken. *Ante* 29-30.

4. At bottom, petitioner contends that a low threshold is good policy and that the standard identified by the California Supreme Court is too onerous. According to petitioner, "The purpose of a *prima facie* case under *Batson* is to help courts and parties answer, not improperly evade, the ultimate question of discrimination," PBOM 9, and only the permissive inference test "can assure inquiry into the challenger's reasons whenever peremptory challenges may be the result of improper discrimination," PBOM 22. He believes "[t]he cost of adding a few minutes to a trial to obtain the reasons for a questioned challenge is far lower than the cost of allowing a trial to proceed which has been tainted by racial discrimination." PBOM 23.

Petitioner's view of the burdens, costs, and benefits is flaw-

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10. The effect does not arise from a true presumption, i.e., one based on proving specific antecedent facts. The four prima facie case elements of *McDonnell Douglas* could not be applied to jury selection. Doing so would render superfluous the various factors this Court has recognized as being relevant to the establishment of a prima facie case. Anytime a minority juror is peremptorily challenged, all four *McDonnell Douglas* factors are met: (1) The prospective juror was a minority; (2) the juror was qualified, no challenge for cause for want of general qualification having been successful, *see, e.g.*, Cal. Civ. Proc. Code §§ 226(c), 227(b), 228 (West 1982 & Supp. 2005); (3) despite the juror's qualification, he or she was rejected; (4) having been rejected, the juror seat necessarily remained open and other qualified jurors were considered.

ed. *Batson* itself recognized that California's standard did not cause "serious administrative burdens." 476 U.S. at 99. The burden imposed under the "more likely than not" standard is no greater than that imposed in the Title VII cases, which themselves concern discrimination.

The purpose of the prima facie case is not to answer the ultimate question of discrimination or to initiate a discovery process designed to allow the objector to develop his claim. Rather, it requires an objector to present his case. It thereby screens out meritless claims, avoiding unnecessary disclosure of trial strategies and preserving the peremptory nature of the challenges by requiring explanations only when discrimination is proven by preponderant evidence. Petitioner's minimalist standard for a prima facie case would needlessly undermine confidence in the jury system as criminal and civil venires were repeatedly excused and the courts investigated improbable, if barely logical, accusations of discrimination. *Cf. Ristaino*, 424 U.S. at 596 n.8 (rejecting *per se* rule requiring voir dire on racial bias).

The "more likely than not" standard allocates the risk of an incorrect determination of the question of discrimination to the party making the objection. That is as it should be. The objecting party properly bears the risk that his evidence might be insufficiently persuasive in light of the circumstances as a whole even though he in fact might be correct about the basis for the peremptory challenges. If, for example, a defendant were to strike several minority prospective jurors, all of whom were affiliated with law enforcement, it would be entirely reasonable to reject the prosecutor's *Batson* objection even though there would be an inference of discrimination. Of course, it could be the defendant in fact challenged the jurors because they were minorities, and in that circumstance, the unconstitutional action would go unproven. But that risk is true when *any* burden is placed on the objecting party. The risk is not only acceptable, it is necessary. Neither voir dire, the judicial system as a whole, nor federalism is well served by interrupting jury selection each time logical but improbable

evidence of discrimination is presented.[11/]

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11. Petitioner's remaining arguments are not within the question presented and will not be addressed. His second argument asserts the state supreme court erroneously allows courts and appellate prosecutors "to postulate hypothetical justifications for challenges in order to disprove a *prima facie* case." PBOM 38. The *types* of evidence courts consider in determining *Batson* motions is unrelated to the degree of *persuasiveness* of the objector's evidence, and his argument confuses an objector's failure of proof (as seen by the trial judge or as apparent on a cold record) with improper speculation. Petitioner also extensively argues the need for comparative jury analysis and the retroactivity of *Miller-El*. *See* PBOM 44 & n.32. This argument too relates to types, not persuasiveness, of evidence. The Court previously rejected petitioner's attempt to obtain review of these issues, *see* Pet. for Cert. (No. 03-6539) i (whether the "California Supreme Court violated the Constitution when it refused to apply comparative juror analysis"; and whether *Miller-El* is retroactive). Moreover, the Ninth Circuit recently agreed that comparative analysis for the first time on appeal was not compelled. *Boyd v. Newland*, 393 F.3d 1008, 1015 (9th Cir. 2004) In his third argument, petitioner asks the Court to determine whether there was a prima facie case. PBOM 47-50. This argument also seeks to answer a question on which the Court declined to grant certiorari—whether "the California Supreme Court violate[d] Batson when it held that the challenges to all three black jurors did not present even an inference of discrimination, which is necessary to establish a prima facie case." Pet. for Cert. (No. 03-6539) i.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: March 9, 2005

Respectfully submitted,

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JAY SHAWN JOHNSON,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of California

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I. A FINDING OF A *PRIMA FACIE* CASE CANNOT AUTOMATICALLY TURN INTO A DETERMINATION ON THE MERITS OF UNLAWFUL DISCRIMINATION

Respondent relies on the premise that a *prima facie Batson* finding (*Batson v. Kentucky*, 476 U.S. 79 (1986)) could automatically turn into a finding of discrimination on the merits if the challenger stands silent and fails to articulate a reason for his challenge when asked. Thus, asserts Respondent, the *prima facie* finding requires proof by a preponderance of the evidence (a) because of the supposed risk that a *prima facie* finding will automatically turn into a merits finding, and (b) because a merits finding must be made by a preponderance of the evidence. (Respondent's Brief (RB) 24-26)

Respondent's premise is defective, because the supposed risk upon which it is based is non-existent. Respondent cannot identify a single case in the nineteen years since *Batson* where the challenger stood silent, or where an objection to a peremptory challenge was sustained by default because the challenger refused to articulate a reason for a peremptory challenge after a request to do so by the court.

When this case was before the Court last term, Petitioner repeatedly pointed out, both in his reply brief and at oral argument, that there was no such case where the challenger stood silent. A year later Respondent still has been unable to identify a single decision where the challenger gave no reason, or where the combination of a *prima facie* case plus the challenger's silence compelled a finding of discrimination.

That result is hardly surprising. No competent attorney would ignore a court's request for an explanation of a

disputed peremptory challenge. Indeed, such a refusal would itself help support an inference that the challenge was based on a constitutionally impermissible purpose.

Respondent relies heavily upon the last sentence of the *Batson* opinion for this argument, but it takes that sentence out of context and misinterprets it. The last sentence reads:

> If the trial court decides that the facts establish, *prima facie*, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed.

Batson v. Kentucky, 476 U.S. at 100. From this single sentence, Respondent asserts that if the prosecutor remains silent, and fails to give a reason, then the prosecutor will automatically lose the *Batson* motion. As shown, this sentence does not mean what Respondent claims it means. A refusal by a prosecutor to provide a reason, upon the trial court's request, is simply unimaginable.

Thus, this sentence does not mean that the Court in *Batson* assumed that prosecutors would often, or ever, refuse to give any explanation for their actions. Rather, the import of this statement was simply to make clear that the purposes of the *prima facie Batson* finding were (i) to elicit an explanation for the challenge, and (ii) to ensure that the proffered explanation, when articulated, was "neutral."

II. THE CORRECT TEST FOR A *PRIMA FACIE* CASE IS WHETHER THE EVIDENCE WOULD PERMIT AN INFERENCE OF DISCRIMINATION, NOT CALIFORNIA'S REQUIREMENT THAT THE OBJECTOR MUST PROVE THAT THE EXISTENCE OF A DISCRIMINATORY MOTIVE WAS "MORE LIKELY THAN NOT"

There are two common types of a *prima facie* case. The first is established by a permissive inference. See, e.g., *Ulster County Court v. Allen*, 442 U.S. 140 (1979). The second is established by proof by a preponderance of the evidence (more likely than not), sufficient to establish a presumption, which will prevail, if not rebutted. Respondent asks this Court to adopt the latter type of *prima facie* case. Respondent's argument should be rejected (a) because it is contrary to the three-step test for analyzing a *Batson* motion which this Court established in *Hernandez v. New York*, 500 U.S. 352, 360 (1991) and *Purkett v. Elem*, 514 U.S. 765 (1995); (b) because it would unduly elevate the threshold for obtaining the reasons for challenges and thereby frustrate *Batson*'s goal of prohibiting peremptory challenges made for discriminatory reasons; and (c) because it would improperly impose a merits test before the objector has access to the most important evidence of possible discrimination, namely, the challenger's reason.

In *Hernandez* and in *Purkett v. Elem* this Court effectively explained that a *prima facie Batson* case is established by a permissive inference. This is because a *prima facie* finding under *Batson* merely shifts the burden of producing evidence, does not create a presumption, and does not shift the burden of persuasion. As the Court held in *Purkett v. Elem*, 514 U.S. at 768, "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." Under this

formula, the burden of proof at *Batson*'s *prima facie* stage is merely a permissive inference of discrimination.

In *Purkett v. Elem*, 514 U.S. 765 at 767-768 the Court reaffirmed that each of these three steps must be evaluated separately, and that merits-level proof is not required until the third step: "It is not until the third step that the persuasiveness of the justification becomes relevant – the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination."

Under this test, the objector does not need to "prov[e] purposeful discrimination" – meaning prove discrimination by a preponderance of the evidence – until the third step of *Batson* analysis, after he has heard the prosecutor's reasons.

Respondent does not explain why the *Hernandez* and *Purkett v. Elem* analysis does not control here.

III. THE CONSEQUENCE OF A *PRIMA FACIE* FINDING IS TO COMPEL THE CHALLENGER TO GIVE A REASON FOR ITS CHALLENGE; THE CHALLENGER SHOULD BE REQUIRED TO DO SO WHEN THE OBJECTOR IDENTIFIES EVIDENCE SUFFICIENT TO PERMIT AN INFERENCE OF DISCRIMINATION

A. The Challenger's Proffered Explanation Is Ordinarily the Critical Evidence Needed to Establish the Existence of Discrimination

The pivotal issue at step one of *Batson* analysis is whether the challenger will be required to state a reason for his challenge. That proffered reason – when articulated – is critical to any finding of unconstitutional discrimination. However, the state's proposed rule requiring the

objector, at step one, to prove the actual existence of discrimination, imposes that burden prematurely, because at that point the objecting party, unlike a Title VII or other civil plaintiff, does not have access to the key evidence of discrimination, namely, the challenger's proffered reason.

Respondent claims that an objector can prove discrimination more easily at the step one *prima facie* stage, before he hears the prosecutor's reasons, than he can at the step three merits stage, after he hears the prosecutor's reasons. (Respondent's Brief (RB) 27) Respondent claims that the absence of the prosecutor's reasons helps, not hurts, the objector, because, supposedly, the prosecutor's reasons would be damaging to the objector's *prima facie* case. (RB 27) This contention ignores reality.

As shown in Petitioner's Brief on the Merits (PBOM), pp. 18-20 and Appendix, we surveyed 84 *Batson* decisions reported in Westlaw from January 1, 2002 through March 1, 2004, which contain or refer to a finding of invidious discrimination. In almost all of these cases, that finding of discrimination turned on analysis of the challenger's stated reason. Respondent does not challenge this data.[1] These cases establish that a *Batson* challenge cannot

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[1] Respondent notes that in one-third (26 of 84) of the cases in the Appendix to the PBOM a challenge to only a single juror was involved. Respondent then argues: "If challenging one juror is enough to establish a *prima facie* case . . . then the *prima facie* requirement serves no function. . . . That result, however, effectively abolishes peremptory challenges. . . . " (RB 31) The argument is contrary to *Batson*. In *Batson*, the Court prohibited even a "single invidious discriminatory governmental act," and held it not necessary to prove "several must suffer discrimination before one could object." *Batson*, 476 U.S. at 95. Respondent admits elsewhere "the well-understood principle that a challenge to a single juror can violate equal protection. See *Batson*, 476 U.S. at 95." (RB 42)

identify and root out discrimination until and unless the objector obtains, and the trial court hears, the challenger's reason.

This is an even-handed procedure. If the challenger states a race-neutral reason, as will often be the case, and if the trial court finds him credible, then the *Batson* motion will be denied on the merits.

However, because discrimination cannot be detected unless the prosecutor's proffered reason is known, the goals of *Batson* will only be realized by broadly construing the opportunity for the trial court to hear that reason. That will be achieved by retaining the *prima facie* threshold at the federal "permissive inference" level. But, if the threshold is pushed upward to California's unduly high "more likely than not" level, the opportunities to hear the challenger's reason will be sharply reduced, and *Batson*'s goals will be thwarted.[2]

B. The State Offers No Persuasive Argument for Obstructing Access to the Critical Evidence of the Challenger's Reason for His Challenge

(1) Respondent claims that *Batson* inquiries should be disfavored, because supposedly they "delay" or "disrupt" the jury selection process. (RB 39) Respondent is mistaken. In the instant case, the denial of two *Batson* motions regarding three jurors took no more than seven

[2] There is still another problem when the challenger does not state his reason, namely, that the record is not fully developed for appeal. Without evidence of the challenger's reason, appellate review is made more difficult, because it is much harder to determine whether the trial court acted properly in rejecting a *Batson* motion.

transcript pages. (Jt. App. 5-11) Ruling on the merits of those motions would have taken only a few minutes more. Trial court litigation of *Batson* claims is invariably brief, occupying only a small portion of the voir dire process.[3] Argument on the *Batson* motion here occurred during a trial recess on the first day, and before voir dire resumed on the second day. There was no "delay" or "disruption" here.

It is better to spend a few extra minutes to learn the prosecutor's proffered reasons, and to ensure that discrimination does not happen, than to take six years, and thousands of hours of litigation, as occurred here, when initial inquiry was not made. The adage about "an ounce of prevention" comes to mind.[4]

[3] See, e.g., *Lancaster v. Adams*, 324 F.3d 423 (7th Cir. 2003); *Paschal v. Flagstar Bank*, FSB, 295 F.3d 565, 574 (6th Cir. 2002); *State v. Dunn*, 831 So. 2d 862 (La. 2002); *State v. Harris*, 820 So. 2d 471 (La. 2002); *State v. Marlowe*, 89 S.W. 2d 464 (Mo. 2002).

[4] Only one amicus curiae brief was submitted in support of Respondent, by the Criminal Justice Foundation (CJF) of Sacramento, California. Notably absent is any brief of amicus curiae from any other state. This confirms that California stands alone (i) in asserting that a preponderance of the evidence is needed to establish a *prima facie Batson* case, and (ii) in prohibiting comparative juror analysis. Further, the position of this one amicus is so at odds with the principles which underlie *Batson* that it should be disregarded. For example, (a) this amicus is largely unconcerned by racial discrimination in jury selection, because it believes that "a jury tainted by racially motivated peremptory challenges can still be impartial." (CJF brief, p. 12) (b) This amicus believes it is more important to insulate a prosecutor from potentially being "embarrass[ed]" by having his racial motives questioned, than it is to preserve the equal protection rights of the jurors and the litigants to be free from racial discrimination in jury selection. (*id.*, pp. 24-26)

(2) Respondent asserts that a permissive inference test would cause prosecutors to reveal their reasons more frequently than they do now (Petitioner agrees), but Respondent asserts that test would interfere with prosecutors' work-product privilege. (RB 9, 30) This argument is without merit. It is similar to arguments raised many years ago against *Batson* itself. See *Id.*, 476 U.S. at 98. Respondent cites no authority allowing any work-product privilege to trump the jurors' Sixth and Fourteenth Amendment equal protection rights not to be excluded from juries for racially-discriminatory reasons.

(3) The state claims that "Petitioner can prevail only if California's standard is constitutionally prohibited," and that it is not, because this Court has not directed the states how to "implement" the *Batson prima facie* test. (RB 22-23). The state argues therefrom that, under federalism, it may use any *prima facie* test it wishes. (RB 22-23) It effectively argues that this Court should allow a double standard to exist, with one standard based on *Batson* and the equal protection clause, and with the other standard based on California procedure. Such dual approach is not allowed.

First, *Hernandez v. New York* and *Purkett v. Elem* establish the three-step process for evaluating a *Batson* claim. These are cases which the Court reviewed for constitutional error, under the Fourteenth Amendment's equal protection clause. Under the Supremacy Clause, those procedures are binding on the states, including California.[5]

[5] Of course, states are free, under their own statutes or constitutions, to protect constitutional rights to an even greater extent than they are protected under the U.S. Constitution.

Second, the California Supreme Court did not itself take such an approach. It did not intend to create an independent or unique California test. Instead, that court intended to follow *Batson*. It believes that its prior standard of "'strong likelihood' has never set a higher standard than *Batson* permits," *People v. Johnson* (2003) 30 Cal.4th 1302, 1317 (Jt. App. 133), and that "the California standard is not less generous than the test the *Batson* court itself applies to establish a *prima facie* case." *People v. Johnson*, 30 Cal.4th at 1319 (Jt. App. 129).[6]

(4) Respondent repeatedly claims that "requiring a statement of reasons from the striking party invalidates California's peremptory challenge statute, which provides that 'no reason need be given for a peremptory challenge.' Cal. Civ. Proc. Code §226(b)." (RB 6, 19, 27, 43) Respondent then argues that a *prima facie* case must be proven by a preponderance of the evidence, because it should take at least that much evidence before a statute may be declared "unconstitutional as applied." (*id.*) Respondent is incorrect.

Respondent relies solely on California Code of Civil Procedure (CCP) §226(b), which states: "A challenge to an individual juror may be taken orally or may be in made in writing, but no reason need be given for a peremptory challenge, and the court shall exclude any juror challenged peremptorily." Respondent contends that the phrase "no reason need be given for a peremptory challenge" categorically bars disclosure of the purpose of a

[6] Indeed, elsewhere in its brief, Respondent admits, contrary to its position on this point, that the California court held that "the different phrasings by this Court and the California Supreme Court . . . did not establish different burdens. . . . " (RB 9)

peremptory challenge. Respondent is mistaken for several reasons.

(a) The portion of CCP §226(b) on which Respondent relies appears to be no more than a definition of a peremptory challenge, framed to distinguish it from a challenge for cause. The "no reason need be given" clause merely explains that in the exercise of a peremptory challenge, unlike a challenge for cause, there is no "need" for a justification.

(b) The interpretation of CCP §226(b) proposed by Respondent cannot be accurate, because it would be wholly inconsistent with California Code of Civil Procedure §231.5, which codifies *Batson*-type challenges, and which provides: "A party may not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of his or her race, color, religion, sex, national origin, sexual orientation, or similar ground." Enforcement of CCP §231.5 would be seriously impaired if CCP §226(b) were construed to create a privilege from disclosing whether a party had acted for the purpose of violating §231.5. Respondent conspicuously fails to cite or discuss §231.5.

(c) Further, CCP §226(b), regardless of its meaning, cannot operate to alter for California litigants the *prima facie* case standard established by *Batson*. If California could impose a more onerous standard for establishing a *prima facie* case, constitutional claims that would be sustained and redressed under *Batson* in other states would in California be rejected for lack of a *prima facie* case. If CCP §226(b) had that effect, it would obstruct enforcement of *Batson* and would be preempted by federal

law. *Felder v. Casey*, 487 U.S. 131, 101 L.Ed.2d 123, 138, 108 S.Ct. 2302 (1988).

(5) The state claims that Petitioner's test calls for a *prima facie* case whenever there is a "mere logical inference," or an "improbable but barely logical" inference, of discrimination, regardless of how weak or strong the inference is. (RB 23, 30, 34, 37) This misdescribes Petitioner's position, which is that a *prima facie* case exists only if the evidence would allow a judge to draw a reasonable inference that challenges were based on group bias. If the inference were no more than "barely logical," a judge would be unlikely to find a reasonable inference of a *prima facie* case.[7]

(6) Respondent claims that because the motion at the *prima facie Batson* stage is supposedly a "merits motion," not a discovery motion, a merits standard should be applied at the *prima facie* stage. (RB 29) Respondent is incorrect. Under *Hernandez* and *Purkett v. Elem* all an objector can win at the *prima facie* stage is the right to obtain discovery, namely, the challenger's claimed reason. The objector cannot prevail on the merits of his *Batson* motion until step three, when he tries to show that the

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[7] For example, every time the prosecutor challenges a black juror, there might be, as Respondent asserts, a "mere logical inference" of discrimination. (See RB 34) However, under the federal cases which interpret *Batson*, and under Petitioner's proposed test, that modicum of evidence would not be sufficient, by itself, to allow a permissive inference of a *Batson* violation to be found without more information. That could include, for example, the race of the defendant, or whether the case contained racial issues, or the racial makeup of the venire. For, the strength of the inference would be quite different if one black juror is challenged when many black jurors remain in the box, or in the venire, as opposed to when only one or two blacks are in the room.

claimed reason is not credible, or pretextual. Thus, a merits test is not applied at the discovery stage.

C. Title VII Standards Do Not Support the Decision of the Court below, Because a Title VII Plaintiff Is Not Required to Prove Intentional Discrimination to Establish a *Prima Facie* Case

The decision of the court below rests on the supposed premises (1) that the standard for a *prima facie* case under *Batson* is, and should be, identical to that for a *prima facie* case of employment discrimination under Title VII, and (2) that in order to establish a *prima facie* case under Title VII, as well as under *Batson*, the plaintiff must persuade the court to make a finding at the *prima facie* stage that intentional discrimination "more likely than not" actually occurred. These supposed premises are inaccurate. Title VII has never been understood to require an employment discrimination plaintiff to prove, as part of his *prima facie* case, that unlawful discrimination actually occurred.

Respondent relies heavily on the following sentence in *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), which Respondent twice quotes in full. (RB 17, 34-35)

> *McDonnell Douglas* did make clear that a Title VII plaintiff carries the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were "based on a discriminatory criterion illegal under the Act."

438 U.S. at 576. Respondent's brief italicizes the words "more likely than not," but simply ignores the earlier portion of this passage, which makes clear a plaintiff need

only show evidence "from which one *can* infer" discrimination.

In *McDonnell Douglas v. Green*, 411 U.S. 792, 802, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973), the Court held that the four elements of a *prima facie* case under Title VII are:

> (i) that [the complainant] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas does not require that to establish a *prima facie* case a plaintiff must not only prove these four elements, but also go further and convince the court to make an additional finding that those elements, or other evidence, demonstrate that discrimination had actually occurred. To the contrary, this Court made clear in *Patterson v. McLean Credit Union*, 491 U.S. 164, 216 (1989), that "[t]he plaintiff need *only* prove by a preponderance of the evidence [the four *McDonnell Douglas* elements.]" (emphasis added)

In literally thousands of applications of *McDonnell Douglas*, including actions under the Age Discrimination in Employment Act, the Americans With Disabilities Act, and section 504 of the Rehabilitation Act, the lower courts have universally understood that a *prima facie* case could be established by proving the four facts set out in *McDonnell Douglas*, or their equivalent, or by adducing any other evidence sufficient to *permit* an inference of discrimination. *McDonnell Douglas* has never been understood to

require at the *prima facie* stage a finding that the existence of discrimination was more likely than not.[8]

Respondent's assertion that a Title VII *prima facie* case requires a finding of discrimination on the merits is also inconsistent with this Court's decisions in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 L.Ed.2d 105, 120 S.Ct. 2097 (2000), and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 125 L.Ed.2d 407, 113 S.Ct. 2742 (1993). Both cases addressed the proper disposition of a case in which the plaintiff had established a *prima facie* case, and the defendant had proffered an explanation which the trier of fact rejected as untruthful. If, *arguendo*, a *prima facie* case necessarily rested on a (preliminary) finding of intentional discrimination, the proffer of an untruthful explanation would do nothing to undermine that finding, and judgment would necessarily have to be entered for the plaintiff. Both *Reeves* and *Hicks*, however, held otherwise.

> The fact finder's disbelief of the reasons put forward by the defendant . . . may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of discrimination. But the Court of Appeals' holding that rejection of the defendant's proffered reasons

[8] The dissent at the California Supreme Court recognized the defect in the majority's reasoning, *People v. Johnson*, 30 Cal.4th at 1336 (Jt. App. 164) (Kennard, J. dissenting):

> To establish a prima facie case in the first stage, a title VII plaintiff is not required to show it is more likely than not that the defendant engaged in illegal discrimination. Instead, the title VII plaintiff is required to prove *facts* from which one can *infer* illegal discrimination.

> *compels* judgement for the plaintiff . . . ignores our repeated admonition that the Title VII plaintiff at all times bears the "ultimate burden of persuasion."

St. Mary's Honor Center, 509 U.S. at 511 (emphasis in original). This reasoning would make no sense if, at the *prima facie* case stage, the plaintiff had already been required to prove that intentional discrimination had occurred.

The standard proposed by Respondent is avowedly a stringent one, requiring a "persuasive showing" (RB 38) or proof of a "strong likelihood" of discrimination. (RB 2, 8, 11-12) Such a demanding requirement is clearly inconsistent with this Court's repeated admonition that under Title VII the burden of proving a *prima facie* case "is not an onerous one." *Patterson v. McLean Credit Union*, *supra*, 491 U.S. at 216; *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 249, 254 (1981); cf. *Price Waterhouse v. Hopkins*, 490 U.S. 220, 270 (1989) (O' Connor, J., concurring) ("The *prima facie* case established [in *McDonnell Douglas*] was not difficult to prove.")

Finally, and surprisingly, the California Supreme Court's interpretation of Title VII law here is not only contrary to this Court's rulings, but is also inconsistent with that court's very own decision in an employment discrimination case only four years earlier. In *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354, 100 Cal.Rptr.2d 352, 8 P.3d 1089, that court expressly adopted the standards utilized by this Court in employment cases. The California court then described (and adopted) the federal *prima facie* case standard which requires only evidence that would *permit* an inference of discrimination.

> [T]he plaintiff[] . . . must at least show "'actions taken by the employer from which one *can* infer,

> if such actions remain unexplained, that it is more likely than not that such actions were "based on a [prohibited] discriminatory criterion. . . ."'" [citation omitted] . . . quoting *Furnco Construction Corp v. Waters*, 438 U.S. 567, 576 (1978).

24 Cal.4th at 355 (emphasis added). That is a far different standard than the decision below here, which requires the court to go further at the *prima facie* stage and actually conclude that discrimination occurred.

IV. THE LOWER COURTS' RELIANCE UPON CONJECTURAL JUSTIFICATIONS AT THE *PRIMA FACIE* STAGE VIOLATES THE RULE THAT A *PRIMA FACIE* CASE IS TO BE EVALUATED WITH THE CHALLENGES "UNEXPLAINED"

The Question Presented is: "Whether to establish a *prima facie* case under *Batson v. Kentucky*, 476 U.S. (1986), the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias?"

This standard is correct insofar as it insists that the sufficiency of a *prima facie* case should be resolved "unexplained," i.e., without regard to any explanations, whether actual or postulated, of the disputed challenges. (Petitioner contends, of course, this standard is incorrect in requiring proof that a peremptory challenge was "more likely than not" motivated by a discriminatory purpose.)

In determining if Petitioner established a *prima facie* case, the courts below attached great – indeed, dispositive – significance to whether those courts themselves could identify a possible legitimate explanation for the disputed challenges. The trial judge found there was no *prima facie*

case because that judge believed that particular statements by the jurors "would have justified a peremptory challenge." (Jt. App. 9) The state supreme court held that affirmance was required, whenever "the record suggests grounds on which the prosecutor *might* reasonably have challenged the jurors." *People v. Johnson*, 30 Cal.4th at 1325. (Jt. App. 147) (emphasis added)

The state defends that reasoning on the theory that at the *prima facie* case stage a trial judge may decline to be "persuaded by a showing offset by other information before them." (RB 3-4, n. 2) In so arguing, the state implicitly attacks the standard in the Question Presented which provides that, at the *prima facie* stage, challenges are to be assessed "unexplained."

The state's argument, relying upon judicially hypothesized reasons, confuses step one and step three of the *Batson* analysis. Under *Batson*, the point at which the court decides if the objector's evidence is "offset by other information," such as articulated reasons, is step three. In determining at step one whether the objector has established a *prima facie* case, the question is narrower – whether the objector's own evidence is sufficient to require disclosure of the claimed reason.

At step one of *Batson* analysis, the *prima facie* stage, if the challenger actually states his reasons, the question of whether there is a *prima facie* case becomes moot, and the court proceeds to determine whether the asserted reason is race-neutral (step two), and whether the reason is valid and credible (step three). *Hernandez v. New York*, *supra*, 500 U.S. at 359 (plurality opinion), citing *United States Postal Service Board v. Aikins*, 460 U.S. 711, 715, 75 L.Ed.2d 403, 103 S.Ct. 1478 (1983) (a Title VII case). Because stated reasons have no place at the *prima facie*

stage, and actually move a case beyond the *prima facie* stage, postulated or speculative reasons are similarly inapplicable, (a) because they are merely a proxy for stated reasons, and (b) because they are a legally insufficient proxy.

At step one the court considers the sufficiency of the objector's showing "if unexplained," because the very purpose of determining if there is a *prima facie* case is to decide whether to require an explanation. It makes no sense, and is directly contrary to *Hernandez v. New York*, for a court to find that there is no *prima facie* case, and excuse the challenger from giving a reason, merely because the court anticipates that the challenger might be able to articulate a race-neutral explanation if he were asked to do so.

It makes even less sense, and is similarly contrary to *Hernandez*, to reject a *prima facie* case because the court itself is able to articulate an explanation of its own for the disputed peremptory. It is irrelevant whether the trial judge, if he or she had been counsel for a party, might have peremptorily challenged a juror. It is equally irrelevant whether that challenge can be "explained" on paper, in the sense that the record provides a rational basis for objecting to the juror in question. If that challenge was in fact the result of a racially-discriminatory motive, it violated the constitution, regardless of whether someone else could identify, after the fact, an arguably race-neutral reason, or regardless of whether the state's actions, on paper, might satisfy a rational basis test.[9] The possibility that certain

[9] See, e.g., *Holloway v. Horn*, 355 F.3d 707, 725 (3d Cir. 2004) ("[S]peculation does not aid our inquiry into the reasons the prosecutor actually harbored for the [disputed] strike. *Batson* is concerned with uncovering purposeful discrimination, . . . our review is focused solely

(Continued on following page)

facts about a juror *could* logically have supported a non-discriminatory challenge cannot establish that those facts were *actually* relied upon by the challenger, or that race-neutral reasons were actually employed.

The state suggests that this error is outside the scope of the Question Presented. (RB 49 n. 12). But the Question framed by the Court expressly proposes that proof of a *prima facie* case be based on the probativeness of the evidence "if unexplained." The Question Presented is not, as the state suggests, limited to the degree of persuasiveness of the objector's evidence; it also encompasses the question about whether or not a particular type of evidence – proposed explanations – should be considered at all at step one. We contend that the exclusion of speculative explanations is a correct one, and that it should preclude at step one any consideration of theoretical explanations hypothesized by the court or appellate counsel.

V. A *PRIMA FACIE* CASE OF A *BATSON* VIOLATION IS SHOWN ON THIS RECORD

Respondent does not deny that a *prima facie* case would be found here if the standard proposed by Petitioner were employed. Specifically, Respondent does not deny that a trier of fact could reasonably have inferred the existence of discrimination from the facts in this case. Respondent does not disagree that the statistical odds were 1:87 here that the prosecutor would challenge all

upon the reasons given"); *Bui v. Haley*, 321 F.3d 1304, 1313-1314 (11th Cir. 2003) (reasons given at post-trial hearing why assistant prosecutor would have challenged jurors fail to satisfy *Batson*, because no showing that chief prosecutor actually relied upon those reasons).

three black jurors (or any other three specific jurors). Respondent does not explain why these facts do not establish a *prima facie* case.

CONCLUSION

Petitioner respectfully requests that this Court reverse the court below and find that a *prima facie* case exists here.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JAY SHAWN JOHNSON,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Court of Appeal of California, First Appellate District

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether to establish a prima facie case under *Batson* v. *Kentucky*, 476 U. S. 79 (1986), the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias?

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IN THE

Supreme Court of the United States

JAY SHAWN JOHNSON,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

Batson v. *Kentucky*, 476 U. S. 79 (1986) is a significant regulation of our justice system. Peremptory challenges are essential to the impartiality of juries, to the fairness of trials, and to avoiding needless retrials. While *Batson* serves the

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

important goal of limiting discrimination in the jury system, it can place significant restraints on the exercise of peremptory challenges. Requiring the proponent of a *Batson* motion to prove discrimination by a preponderance of the evidence before forcing the opposing counsel to justify the peremptory challenges prevents *Batson* from being used as a device to thwart valid, nondiscriminatory challenges, while preserving *Batson*'s integrity. Overturning this rule would cause serious harm to peremptory challenges and the administration of justice, which would be contrary to the interests of justice and society which the CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The defendant, Jay Shawn Johnson, was convicted of the second-degree murder of his girlfriend's 19-month-old daughter and of assault resulting in the death of a child younger than eight. See *People* v. *Johnson*, 30 Cal. 4th 1302, 1306-1307, 71 P. 3d 270, 272 (2003); Cal. Penal Code §§ 187, 273ab. The district attorney exercised twelve peremptory challenges using three to strike all of the African-Americans from the panel. See *id.*, at 1307, 71 P. 3d, at 272. After the second African-American venire member was challenged, the defense "made a '*Wheeler* motion.' " See *ibid.* This motion refers to *People* v. *Wheeler*, 22 Cal. 3d 258, 583 P. 2d 748 (1978), which held that the California Constitution prevented peremptory challenges motivated by group bias. See *id.*, at 276-277, 583 P. 2d, at 761-762. *Wheeler* preceded this Court's decision invalidating race-based peremptory challenges on equal protection grounds. See *Batson* v. *Kentucky*, 476 U. S. 79, 82, n. 1 (1986).

Defense counsel stated that the "motion '[m]ore specifically . . . concerns [S.E.], the last individual who was eliminated by the People,' " and argued that the prosecution had no apparent reason for striking her other than her race. He made no

argument regarding the first juror. See 30 Cal. 4th, at 1307, 71 P. 3d, at 272. The trial

> "court responded that 'based on the record that's been made, [it] would find that there's not been shown a strong likelihood that the exercise of the peremptory challenges were based upon a group rather than an individual basis. The Court has to start from the position of a premise that the exercises of the peremptory challenges were based on constitutional grounds.' The court also told the district attorney, however, that 'we are very close.' " *Id.*, at 1307, 71 P. 3d, at 272-273.

The defendant renewed his *Wheeler* motion after the third African-American venire member was removed by peremptory challenge. See *id.*, at 1307, 71 P. 3d, at 273. This time the motion was based on the fact that the district attorney's peremptory challenges had removed all African-Americans from the panel. It was denied in a detailed ruling by the trial court. See *ibid.* Considering the last challenged juror, the trial court stated that it had

> "concerns with regard to her qualifications in this matter based upon her answers on the questionnaire; specifically, the Court had noted that she had a sister who had had drug charges, although her answers in follow-up verbally were such that the Court would not have found that the issues were such to lead to a challenge for cause. May be sufficient to justify a peremptory challenge by the People. [¶] Also, with regard to her answers generally on the questionnaire itself, there was an indication that she had difficulty understanding some of the issues, and specifically, her last response which was somewhat rambling on the questionnaire indicated that she herself felt that she had difficulty understanding things. Again, her verbal responses here in court were such that I would not have granted a challenge for cause on that basis, but the Court felt that the answers on the questionnaire were sufficient that they certainly would have justified a peremptory challenge by either side,

frankly, based upon the concerns about her ability to understand the proceedings." *Ibid.*

The trial court further noted that it also had concerns about S.E., the second challenged African-American panel member. Based on her *voir dire* answers, the court would not grant a challenge for cause, but it understood that either side would be justified in using a peremptory challenge against her due to her emotional nature. See *id.*, at 1307-1308, 71 P. 3d, at 273.

> " 'In summary,' the [trial] court said 'with regard to the jurors, while the Court would not grant the challenges for cause, there were answers . . . at least on the questionnaires themselves such that the Court felt that there was sufficient basis for the peremptory challenge. [¶] Even with the addition of [the most recent challenge], the Court will not find a prima facie case.' " *Id.*, at 1308, 71 P. 3d, at 273.

The Court of Appeal reversed, finding that *Wheeler*'s " 'strong likelihood' " standard violated *Batson*. See *ibid.* Comparing the *voir dire* answers given by the challenged jurors to the answer of the unchallenged jurors, the intermediate appellate court found "that 'a prima facie case of group bias was established and the judgment must therefore be reversed.' " *Ibid.*

The California Supreme Court reversed the appellate court's judgment and reinstated the conviction. California's high court addressed whether *Wheeler*'s " 'strong likelihood' " standard was unconstitutionally higher than the *Batson* standard for proving a prima facie case of discrimination. It extensively analyzed the *Wheeler* and *Batson* standards, see *id.*, at 1309-1312, 71 P. 3d, at 274-276, and concluded that although they used different language, the *Wheeler* and *Batson* standards were the same. See *id.*, at 1318, 71 P. 3d, at 280. This "means that to state a prima facie case, the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias." *Id.*, at 1318, 71 P. 3d, at 280. Therefore, the trial court correctly

relied on *Wheeler*. See *ibid.* This Court granted certiorari on December 1, 2003.

On May 3, 2004, this Court dismissed certiorari for lack of jurisdiction. It found that challenges to the conviction that were not resolved by the California courts deprived this Court of the final judgment necessary for jurisdiction on certiorari. See *Johnson* v. *California*, 541 U. S. 428 (2004). On remand, the California Court of Appeal rejected the defendant's unresolved claims and concurrently denied a habeas petition raising an ineffective assistance claim. See *People* v. *Johnson*, No. A106431, 2004 Cal. App. Unpub. Lexis 7284 (Aug. 5, 2004). The California Supreme Court denied the defendant's petition for review on October 20, 2004. See *People* v. *Johnson*, No. S127602, 2004 Cal. Lexis 10226 (October 20, 2004). This Court granted certiorari on January 7, 2005.

SUMMARY OF ARGUMENT

Any interpretation of *Batson* v. *Kentucky*, 476 U. S. 79 (1986) should take account of the interests influenced by that decision. Rather than creating a substantive right, *Batson* developed a procedure for addressing claims of discriminatory peremptory challenges. This procedure, although important, can be interpreted flexibly without doing violence to the underlying right to be free from discrimination in jury selection.

The procedure for determining a particular constitutional claim is often set with an eye towards policy and various competing interests. Examples are found in this Court's decisions establishing the preponderance standard for determining the voluntariness of confessions and the validity of waivers under *Miranda* v. *Arizona*, 384 U. S. 436 (1966). *Batson*'s rule primarily serves the interests of society and the excluded juror. It is possible for a litigant to experience *Batson* error at trial, and still have a fair trial in front of an impartial jury. This use of the *Batson* motion as a proxy for societal interests reinforces

the need to minimize *Batson*'s costs to society while preserving its benefits.

Peremptory challenges are essential to fair and effective trials. Their primary function is to allow the parties to remove the most biased individuals from the jury. Challenges for cause are too restrictive to weed out more than a handful of biased jurors. Peremptory challenges allow the parties to weed out more biased jurors, and to question aggressively on *voir dire* without the fear of leaving an offended juror on the jury. Removing biased jurors from the petit jury improves the fairness of juries and diminishes the risk of hung juries in criminal cases. Peremptory challenges also give legitimacy to verdicts by allowing the parties to shape the jury to their liking. The peremptory challenge has long been considered essential to the justice system and remains so even after *Batson*.

Peremptory challenges are vulnerable to excessive scrutiny. Discerning bias is not a science, and peremptory challenges are often made for reasons that cannot be readily articulated. *Batson*, by requiring counsel to explain the unexplainable, places a substantial burden on the exercise of such challenges. A nondiscriminatory peremptory challenge that is based upon a hunch or a similarly difficult to explain rationale runs a real risk of being struck down under *Batson*.

Batson's influence over peremptory challenges is much greater now than when it was decided. The rule now covers any peremptory challenge made at any trial. This pervasive regulation has become a tactic for litigators to use to embarrass opposing counsel or to frustrate attempts to remove a juror biased in their favor.

California's approach to *Batson* reflects the right balance between the decision's costs and benefits. It minimizes *Batson*'s burden on peremptory challenges, while preserving the rule against jury discrimination. Any lowering of the California standard will only invite more tactical abuses of the *Batson*

rule and further limit the ability of parties to weed out biased jurors.

This reading of *Batson* is consistent with the language of *Batson* and cases interpreting it. Since the proponent's case is only made at the first stage of the *Batson* hearing, it is only sensible to require the proponent to carry its entire burden at the first stage. This analysis is reinforced by the fact that establishing a prima facie case under *Batson* shifts the burden of proof to the opponent of the motion. *Batson*'s use of prima facie case is also consistent with the first definition of this term found in Wigmore's treatise. In Wigmore's first definition of prima facie case, the moving party proves the case by a substantial body of evidence, which shifts the burden to the opposing party to produce evidence to rebut the claim. This describes *Batson* and the California procedure implementing *Batson*.

ARGUMENT

I. Any interpretation of the *Batson* test should take account of the interests influenced by that decision.

Batson v. *Kentucky*, 476 U. S. 79 (1986) is primarily a procedural decision. It established a means of proving equal protection claims against peremptory challenges. This Court first noted that the prosecution's exercise of peremptory challenges might violate equal protection in *Swain* v. *Alabama*, 380 U. S. 202, 224 (1965). *Swain* set a high standard for proving discriminatory peremptory challenges. An inference of purposeful discrimination could be found on evidence that the prosecutor

> "in case after case, whatever the circumstances, whatever the crime, and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and

who have survived challenges for cause, with the result that no Negroes ever serve on petit juries . . . ." *Id.*, at 223.

While Swain demonstrated that the prosecution used peremptory challenges to remove all African-Americans from his jury, he had no evidence regarding the exercise of peremptory challenges in other cases. See *id.*, at 224-226. Therefore, he could not win his jury discrimination claim because he failed to carry his burden of proof. See *id.*, at 226. The *Batson* decision was a reexamination of *Swain*'s evidentiary burden on the party alleging discriminatory peremptory challenges. See 476 U. S., at 82.

This Court determined that the standard in *Swain* created a "crippling burden of proof" on the party attacking the peremptory challenge that effectively nullified the prohibition against discriminatory peremptory challenges. See *id.*, at 92. It therefore, rejected the *Swain* standard for proving a prima facie case of discrimination. See *id.*, at 93. The defendant could now establish a prima facie case "solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial." *Id.*, at 96. The defendant must show that he or she belongs to a "cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race." *Ibid.* (citation omitted). The discrimination claim can rely on the fact "that peremptory challenges constitute a jury selection practice that permits, 'those to discriminate who are of a mind to discriminate.' " *Ibid.* (quoting *Avery* v. *Georgia*, 345 U. S. 559, 562 (1953)). In addition, the defendant may use any other relevant circumstances to "raise an inference" of discrimination. See *ibid.*

The *Batson* Court next provided the procedural framework for resolving claims that peremptory challenges violated equal protection. It established a three-part test for determining whether these claims were valid. First the defendant must establish a prima facie case of discrimination, which then shifts the burden to "the State to come forward with a neutral explanation" for the peremptory challenges. See 476 U. S., at 97. If a neutral explanation is offered, "[t]he trial court then will have the duty to determine if the defendant has established purposeful discrimination." *Id.*, at 98.

This case concerns the first part of the *Batson* test, the standard of proof for a prima facie case. This is not part of the substantive guarantee against discrimination in peremptory challenges. It deals with the means of resolving these claims. As a procedure for determining constitutional claims, *Batson* should reflect the constitutional policies that it serves, while minimizing the costs and maximizing the benefits to society. *Batson*'s evidentiary rule, while important to securing the substantive guarantee of equal protection for jurors, can be interpreted flexibly without doing violence to the underlying constitutional right to be free from discrimination in jury selection.

The procedure for determining a particular constitutional claim is often set with an eye towards policy and various competing interests. One example is the burden of proof for proving that the suspect made a valid waiver under *Miranda* v. *Arizona*, 384 U. S. 436 (1966). This Court has stated that the government had a "heavy" burden in proving a valid *Miranda* waiver, without specifying what would satisfy that burden. See *id.*, at 475; *Tague* v. *Louisiana*, 444 U. S. 469, 470-471 (1980) (*per curiam*); *North Carolina* v. *Butler*, 441 U. S. 369, 373 (1979). Nothing more was said about the procedure for determining a *Miranda* waiver until *Colorado* v. *Connelly*, 479 U. S. 157 (1986), which set the evidentiary standard.

Connelly addressed a Colorado Supreme Court opinion holding that the state's burden of proving a valid *Miranda* waiver could only be discharged through clear and convincing evidence. See *id.*, at 167. While *Miranda* did describe the burden of proving a waiver as heavy, this did not mandate a clear and convincing evidence standard. See *id.*, at 167-168. Analysis was driven by what standard of proof protected the

Miranda rule while serving society's interests in admitting voluntary confessions.

Connelly adopted the standard for determining the voluntariness of confessions found in *Lego* v. *Twomey*, 404 U. S. 477 (1972). *Lego*'s holding that the prosecution must prove the voluntariness of a confession by a preponderance of the evidence, see *id.*, at 489, was driven by policy. Although *Jackson* v. *Denno*, 378 U. S. 368 (1964) noted that there may be some "relationship between the involuntariness of a confession and its unreliability," *Lego*, *supra*, at 484, the confession's reliability was irrelevant to the voluntariness hearing. See *id.*, at 484-485, n. 12. Thus *Jackson* was not based on a fear that juries would admit unreliable confessions "and arrive at erroneous determinations of guilt or innocence." See *id.*, at 484-485. *Jackson* was only intended to prevent a defendant from being "compelled to condemn himself by his own utterances." *Id.*, at 485. Since the voluntariness hearing "has nothing whatever to do with improving the reliability of jury verdicts, we cannot accept the charge that judging the admissibility of a confession by a preponderance of the evidence undermines the mandate of *In re Winship*, 397 U. S. 358 (1970)." *Id.*, at 486.

The policies behind the exclusionary rule also played a role in the *Lego* decision. The defendant claimed that even if *Winship* did not mandate using the reasonable doubt standard for determining a confession's voluntariness, that standard was still necessary "in order to give adequate protection to those values that exclusionary rules are designed to serve." 404 U. S., at 487. Since exclusionary rules like *Miranda* and *Mapp* v. *Ohio*, 367 U. S. 643 (1961) require the exclusion of evidence "for reasons wholly apart from enhancing the reliability of verdicts," it was argued that these same values mandated a reasonable doubt standard in the context of the voluntariness of confessions. See 404 U. S., at 488. Although this argument was "straightforward and has appeal," *ibid.*, *Lego* rejected it,

since acceptance would disrupt the exclusionary rule's balance of interests.

Experience showed that the reasonable doubt standard was unnecessary to protect the exclusionary rule. The preponderance standard was used for many years in determining the admissibility of confessions and the products of searches and seizures without undermining either exclusionary rule. See *ibid.* New barriers to admitting "truthful and probative evidence" should not be raised without good cause. See *ibid.* Any extra deterrent to lawless conduct from raising the burden of proof would not outweigh society's interests "in placing probative evidence before juries for the purpose of arriving at truthful decisions about guilt or innocence." *Id.*, at 489. Since the cost of imposing the reasonable doubt standard exceeded any benefits, there was no need to require more than a preponderance.

Connelly adopted this approach to the context of the *Miranda* waiver. Since the *Miranda* rule was an "auxiliary" to the voluntariness requirement for confessions, *Miranda* waivers should not be subject to a higher evidentiary standard. See *Connelly*, 479 U. S., at 169. Most importantly, the balance of interests reflected in the exclusionary rule would be disrupted by imposing additional barriers to the admissibility of evidence. See *ibid.* Therefore *Lego* was reaffirmed and the preponderance standard applied to the *Miranda* waiver issue. See *id.*, at 168.

Exclusionary rules such as *Miranda* and *Mapp* operate at considerable cost to society. They can frustrate public safety and undermine the accuracy of trials by suppressing reliable evidence simply because the "constable has blundered." See *People* v. *Defore*, 150 N. E. 585, 587 (N.Y. 1926); *Nix* v. *Williams*, 467 U. S. 431, 447-448 (1984). While they serve a constitutionally necessary purpose, expanding the scope of exclusionary rules tips the balance of interests too far from society. *Lego* and *Connelly* refused to adopt a more stringent evidentiary standard in order to avoid this type of disruption.

Batson involves similar balancing. It serves the important goal of preventing jury discrimination, but at a high cost in burdening peremptory challenges. Any procedure for resolving *Batson* claims should balance these interests.

In this sense, *Batson*'s rule parallels exclusionary rules such as *Mapp* and *Miranda*. Those two decisions can give a windfall to the defendant asserting either right by suppressing valid evidence in order to protect other constitutional interests. *Batson* allows a litigant to gain the benefit of its rule although the litigant is not its primary beneficiary. This allows *Batson* to create a windfall for some litigants.

While the Equal Protection Clause prohibits discrimination that excludes people from the jury because of their race or gender, the Constitution does not require the petit jury to actually represent a fair cross-section of the community. See *Holland* v. *Illinois*, 493 U. S. 474, 478 (1990). *Batson* is premised on the idea that group membership is irrelevant to a juror's impartiality. See *Batson*, 476 U. S., at 87. Therefore, a jury selected in part by racially motivated peremptory challenges can still be impartial. See *Holland*, *supra*, at 487-488. While discriminatory peremptory challenges do harm the relevant party, see *Batson*, *supra*, at 86, it is difficult to quantify this damage. Although discrimination harms the party in some way, a fair trial is more important to the party than jury discrimination.

Batson more readily serves society and the excluded juror. Exclusion from jury service due to race or gender discriminates against the excluded juror. See *id.*, at 87. This discrimination robs the average person of his or her "most significant opportunity to participate in the democratic process" outside of voting. See *Powers* v. *Ohio*, 499 U. S. 400, 406-407 (1991). The high cost of litigation prevents the juror from personally protecting his or her right to remain on the jury through a civil rights action. See *Georgia* v. *McCollum*, 505 U. S. 42, 56 (1992). *Batson* allows the parties to protect the jurors' equal protection rights, see *ibid.*, just as the Fourth Amendment exclusionary

rule allows criminal defendants to protect Fourth Amendment rights that could not be protected through other remedies. See *Mapp*, 367 U. S., 652-653.

The most important interests served by *Batson* are society's. Jury discrimination strikes at the integrity of the justice system. It "undermine[s] public confidence in the fairness of our system of justice." See *Batson*, 476 U. S., at 87. Discrimination in jury selection also stimulates the prejudice upon which it is based. See *id.*, at 87-88. In racially-charged cases, jury discrimination can undermine public confidence in verdicts with disastrous results. See *McCollum*, 505 U. S., at 49-50. *Batson* allows the litigants to serve as proxies for society in order to limit this social harm.

This use of litigants as proxies for other interests creates windfalls for some parties. If the trial court grants a *Batson* motion, the typical remedy is either to disallow the peremptory challenge and place the challenged person on the jury, or to dismiss the entire venire. See 5 W. LaFave, J. Israel, & N. King, Criminal Procedure § 22.3(d), p. 335 (2d ed. 1999). If the trial court reinstates the challenged juror, then the party making the *Batson* claim may gain a small advantage, since the juror may feel some hostility to the party that made the unsuccessful peremptory challenge. *Batson*'s real windfall occurs on appeal. If a *Batson* claim is successfully raised on appeal, then the party raising the claim gets a new trial even though the case was tried by an impartial jury.[2] While *Batson* error may compromise the integrity of the verdict, particularly in racially-charged cases, in many cases it will not. Unfortunately, there is no way for determining whether *Batson* error has in fact undermined the verdict. This problem is compounded by the fact that *Batson* error is effectively *per se* reversible. This Court has never used harmless error analysis when addressing

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2. This argument does not apply to *Batson* violations by criminal defendants, since the prosecution cannot appeal acquittals. See *Smalis* v. *Pennsylvania*, 476 U. S. 140, 145-146 (1986).

Batson violations, see Muller, Solving the *Batson* Paradox: Harmless Error, Jury Representation, and the Sixth Amendment, 106 Yale L. J. 93, 117 (1996), and every federal circuit that has addressed the issue has held that *Batson* error leads to automatic reversal. See Henning, Prosecutorial Misconduct and Constitutional Remedies, 77 Wash. U. L. Q. 713, 791 (1999).

Automatic reversal for an error that may have no effect on the fairness of the trial is justified by the social interests that *Batson* serves. Jury discrimination is a real threat to jurors and society, and *Batson* provides the only realistic means of limiting this harm. However, any interpretation of *Batson* must be careful to control its social costs.

The decision to depart from *Swain* and lower the evidentiary burden of proving racially discriminatory peremptory challenges was based on policy considerations. While the *Batson* Court understood the importance of peremptory challenges to the fairness and justice of trials, see 476 U. S., at 98-99, given *Swain*'s inability to enforce the equal protection prohibition against jury discrimination, it was necessary to shift the burden away from the party attacking the allegedly discriminatory challenge. That decision reflected a balancing of interests. The new evidentiary standard would not compromise peremptory challenges, while enhancing public respect for the justice system and strengthening the rule of law. Any interpretation of *Batson* procedure should keep its balance of interests in mind.

II. Peremptory challenges are essential to effective and fair trials.

While this Court first invalidated racial discrimination in jury selection in *Strauder* v. *West Virginia*, 100 U. S. 303, 310 (1880), effective regulation of discriminatory peremptory challenges did not happen until *Batson* v. *Kentucky*, 476 U. S. 79 (1986). This Court's initial reluctance to involve the

Constitution in peremptory challenges reflects the importance and delicacy of this procedure. Although there is no constitutional right to peremptory challenges, see *Stilson* v. *United States*, 250 U. S. 583, 586 (1919), it is difficult to imagine a trial that is fair without peremptory challenges. *Batson*'s balance must weigh the vital interests served by peremptory challenges.

"The peremptory challenge has very old credentials." *Swain* v. *Alabama*, 380 U. S. 202, 212 (1965). Granting peremptory challenges to the accused in capital cases was described as "a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous." 4 W. Blackstone, Commentaries 346 (1st ed. 1769). The prosecution also had peremptory challenges or a similar procedure at the common law. See *Swain*, *supra*, at 213. From its common law roots, peremptory challenges have spread to every jurisdiction. See 5 W. LaFave, J. Israel, & N. King, Criminal Procedure § 22.3(d), p. 320 (2d ed. 1999).

Peremptory challenges serve several necessary functions. One important feature is compensating for the very restrictive rules concerning challenges for cause. Challenges for cause "permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality." *Swain*, *supra*, 380 U. S., at 220. While the grounds vary among jurisdictions they

> "are typically stated in terms of specific situations: that the person lacks the legal qualifications for jury service; that he has previously served as a juror on some related matter . . . ; that he has served or will serve as a witness regarding the subject matter of the pending trial; or that he is related in some degree to the defendant or others directly involved in the case." 5 W. LaFave, *et al.*, *supra*, § 22.3(c), at 305-306 (footnotes omitted).

Usually the rules also contain a catch-all provision, allowing courts to exclude for cause jurors who have already formed a sufficiently strong opinion of the case that they cannot act as an

unbiased juror. See *ibid.* This general provision requires much more bias than knowledge of the facts of the case and forming some opinion from these facts. The Constitution only requires that "the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." See *Irvin* v. *Dowd*, 366 U. S. 717, 723 (1961). If the trial court believes that the potential juror can set aside any previously formed opinions of the case, then it can deny a for-cause challenge.

Peremptory challenges help to preserve the right to an impartial jury by allowing the parties to remove biased jurors who are not weeded out by the narrow for-cause challenge. Prospective jurors are presumed to be impartial, see *ibid.*, and trial courts are reluctant to grant for-cause challenges under the general bias provision. "Such challenges are often denied—even when common sense indicates that there *must* be bias—as long as the potential juror says that she would decide the case 'only on the evidence presented' and would not be influenced by any other factor." Babcock, Voir Dire: Preserving "Its Wonderful Power", 27 Stan. L. Rev. 545, 549-550 (1975) (emphasis in original). Indeed, some jurors will "evade or misconstrue, unconsciously or deliberately, general voir dire questions in order to avoid answering and being struck." *Id.*, at 547. Thus, potential jurors are struck for cause only when the bias is "blatant." Pizzi, *Batson* v. *Kentucky*: Curing the Disease But Killing the Patient, 1987 S. Ct. Rev. 97, 126, n. 186. Improperly denied for-cause challenges are almost unreviewable.

> "It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the 'conscience or discretion' of the court." *Reynolds* v. *United States*, 98 U. S. 145, 156 (1879).

Peremptory challenges allow parties to remove biased jurors who should have been removed for cause but were not, see

United States v. *Martinez-Salazar*, 528 U. S. 304, 319 (2000) (Scalia, J., concurring in the judgment), or those where the case for bias is close, like the present case. See *supra*, at 3-4.

Peremptory challenges also help find jurors that should be removed for cause. Aggressive questioning of potential jurors is often necessary to find bias. This questioning can offend the juror even if he or she is not removed for cause. The peremptory challenge allows a party to question aggressively without the fear of leaving a hostile juror on the jury. See *Swain*, 380 U. S., at 220; *United States* v. *Annigoni*, 96 F. 3d 1132, 1137-1138 (CA9 1996) (en banc).

The question of a juror's bias is rarely answered by a simple yes or no. Bias exists on a continuum. Those jurors at the very extreme end, who have some personal relationship with the case or are blatantly biased towards or against a party, are removed for cause. Those with less extreme, but still substantial bias will be removed by peremptory challenges. This has important benefits for the efficiency, justice, and representative nature of the jury.

Extremist jurors are a substantial threat to the integrity of verdicts in criminal cases. Since unanimity or near unanimity is necessary for a verdict in criminal cases, *Apodaca* v. *Oregon*, 406 U. S. 404, 411 (1972) (10-2 verdict does not violate the Sixth Amendment); *Burch* v. *Louisiana*, 441 U. S. 130, 139 (1979) (unanimous jury required when six jurors), a few substantially biased jurors can hold out in spite of strong evidence and hang a jury. Improperly hung juries give no legitimate benefit to anyone. Retrial is expensive, time-consuming, and risky. It is bad enough to force society to bear these costs, but much worse for a criminal defendant to bear the costs of an unnecessary retrial. While there may be no constitutional right to peremptory challenges, they are important to preserving accuracy of verdicts in criminal cases.

The defense and prosecution are entitled to an impartial jury, see *Holland* v. *Illinois*, 493 U. S. 474, 483-484 (1990), as

are civil litigants. In addition to avoiding hung juries, removing irredeemably biased jurors makes juries fairer and more impartial. "Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of 'eliminat[ing] extremes of partiality on both sides,' " assuring a representative and unbiased jury. *Id.*, at 484 (quoting *Swain*, 380 U. S., at 219). It is therefore understandable that "[t]he constitutional phrase 'impartial jury' takes its content from this unbroken tradition" of peremptory challenges. *Id.*, at 481. An impartial jury is not one in which no juror has any bias, as that is impossible. It is one in which each juror "can lay aside his opinion and render a verdict based on the evidence . . . ." *Patton* v. *Yount*, 467 U. S. 1025, 1037, n. 12 (1984). By removing from the jury those who either party feels cannot meet this standard, peremptory challenges are "essential to the fairness of trial by jury." *Lewis* v. *United States*, 146 U. S. 370, 376 (1892).

Peremptory challenges are also important to establishing a belief in the justice of our system and the propriety of jury verdicts. The challenges allow the parties to shape the jury to their liking. See Henning, Prosecutorial Misconduct and Constitutional Remedies, 77 Wash. U. L. Q. 713, 780-781 (1999). Assuring both parties that they are being tried by an impartial factfinder gives the verdict legitimacy.

> "[T]he peremptory challenge teaches the litigant, and through him the community, that the jury is a good and proper mode for deciding matters and that its decision should be followed because in a real sense the jury belongs to the litigant: he chooses it. Without giving any reason or meeting any legal test, he may dismiss from 'his' jury those he fears or hates the most, so that he is left with 'a good opinion of the jury, the want of which might totally discon-cert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice even without being able to assign a reason for such dislike.' The ideal that the peremptory serves is that the jury not only

> should be fair and impartial, but should seem to be so to those whose fortunes are at issue." Babcock, 27 Stan. L. Rev., at 552 (footnotes omitted) (quoting Blackstone).

As Justice Frankfurter noted, "The appearance of impartiality is an essential manifestation of its reality." *Dennis* v. *United States*, 339 U. S. 162, 182 (1950) (dissenting opinion). A majority of this Court also noted the importance of the peremptory challenge to preserving the perception and the reality that the trial is fair. See *Swain* v. *Alabama*, 380 U. S., at 219. Although *Swain* was partially invalidated by *Batson*, this does not deny the importance of the peremptory challenge or the relevance of this analysis. By setting a standard of proof that could not be met, see *Batson*, 476 U. S., at 92-93, *Swain* went too far in setting the balance between equal protection and peremptory challenges. Even after *Batson*, though, peremptory challenges are still important to our justice system. See *id.*, at 98-99; *Holland*, 493 U. S., at 484 (citing *Swain*).

"The right to challenge a given number of jurors without showing cause is one of the most important of the rights secured to the accused." *Pointer* v. *United States*, 151 U. S. 396, 408 (1894) (Harlan, J.). It was recognized by the common law as a means of insuring an impartial trial. See *ibid.* "Any system for the empanelling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of that right, must be condemned." *Ibid.* While peremptory challenges must be regulated under *Batson*, it is important to keep in mind their considerable benefit to litigants and society.

III. Peremptory challenges are vulnerable to excessive scrutiny.

The peremptory challenge has a unique and fragile nature. Unlike almost every other aspect of the law, the peremptory challenge does not have to be justified, or even logical. This lack of justification is no accident. Instead, it is integral to the

peremptory challenge and its role in protecting the fairness and integrity of trials. *Batson* v. *Kentucky*, 476 U. S. 79 (1986), by requiring attorneys to give reasons for that which needs no reason, threatens to turn peremptory challenges into diluted for-cause challenges if expanded too far.

From their beginning, peremptory challenges were designed to need no justification. At the common law they were labeled "an arbitrary and capricious species of challenge . . . ." 4 W. Blackstone, Commentaries 346 (1st ed. 1769). Similarly, Coke describes it as the right to "peremptorily challenge 'on his own dislike' without showing any cause; [the defendant] may exercise that right without reason or for no reason, arbitrarily and capriciously." *Pointer* v. *United States*, 151 U. S. 396, 408 (1894) (quoting 1 E. Coke, Institutes 156b (19th ed. 1832)).

The peremptory challenge's nature has not changed. "The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." *Swain* v. *Alabama*, 380 U. S. 202, 220 (1965). Jury selection is more art than science, and the psychology of bias is at best inexact. While *voir dire* can help provide a solid foundation for uncovering bias in some cases, effective use of the peremptory challenge often hinges on rationales that cannot be explained with any precision. "Indeed, often a reason for it cannot be stated, for a trial lawyer's judgments about a juror's sympathies are sometimes based on experienced hunches and educated guesses, derived from a juror's responses at voir dire or a juror's ' "bare looks and gestures." ' " *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U. S. 127, 148 (1994) (O'Connor, J., concurring). The fact that a challenge is based on a hunch does not mean that it is wrong. Nonverbal cues can reveal a juror's attitude as much as verbal responses. See V. Starr & M. McCormick, Jury Selection 445-446 (3d ed. 2001). "Our belief that experienced lawyers will often correctly intuit which jurors are likely to be the least sympathetic, and our understanding that the lawyer will often

be unable to explain the intuition, are the very reason we cherish the peremptory challenge." *J. E. B.*, *supra*, at 148 (O'Connor, J., concurring).

Peremptory challenges are vulnerable to explanation. Since it is their nature not to have readily articulated reasons for their exercise, requiring too may reasons may undercut peremptory challenges, destroying their utility. "But, as we add, layer by layer, additional constitutional restraints on the use of the peremptory, we force lawyers to articulate what we know is often unarticulable." *Ibid.* (O'Connor, J., concurring). *Batson*, by requiring counsel to explain the unexplainable, burdens peremptory challenges.

The question presented in this case is how much will *Batson* burden peremptory challenges. *Batson* itself did not conclusively determine this because the decision was so open-ended. Justice White's statement that "[m]uch litigation will be required to spell out the contours of the Court's equal protection holding today . . . ," *Batson*, 476 U. S., at 102 (White, J., concurring), was prophetic, as *Batson* has led to a series of interpreting decisions. Most of them have expanded *Batson*'s regulation of peremptory challenges, see, *e.g.*, *Powers* v. *Ohio*, 499 U. S. 400, 402 (1991) (litigant does not have to be of the same race as the excluded juror to raise a *Batson* claim); *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614, 616 (1991) (*Batson* applies to civil cases); *Georgia* v. *McCollum*, 505 U. S. 42, 59 (1992) (*Batson* applies to criminal defendants); *J.E.B.*, 511 U. S., at 129 (*Batson* applies to gender-based peremptory challenges), although a few have not. See, *e.g.*, *Hernandez* v. *New York*, 500 U. S. 352, 361 (1991) (plurality) (upholding prosecution peremptory challenges against bilingual venire members believed to be unable to accept the official translation); *Purkett* v. *Elem*, 514 U. S. 765, 768 (1995) (*per curiam*) (justification for challenge need not be even minimally persuasive to satisfy *Batson*'s second prong). Since *Batson* applies to all litigants and one does not have to be a member of the same group as the excluded juror, it now

looms over every peremptory challenge, making it much more invasive than when it was decided.

This fact may help to explain *Purkett*. Its holding that *Batson*'s second step "does not demand an explanation that is persuasive, or even plausible," 514 U. S., at 768, helps keep *Batson* from eviscerating the peremptory challenge. Yet *Batson* remains still a significant burden on peremptories. Requiring any justification, even an implausible one, is still inconsistent with the idea behind peremptory challenges. Also, while *Batson*'s second prong may be satisfied by a facially implausible justification, such a justification is not likely to save a peremptory challenge from a *Batson* motion.

At *Batson*'s third stage, in which the trial court determines whether the peremptory challenges were in fact discriminatory, see *Batson*, 476 U. S., at 98, "implausible or fantastic justifications may (*and probably will*) be found to be pretexts for purposeful discrimination." *Purkett*, 514 U. S., at 768 (emphasis added). *Purkett* has not reduced *Batson* to a formality. "Under *Purkett*, trial courts must still decide whether a proffered explanation is a subterfuge, and this can be a basis for appeal and reversal." *United States* v. *Annigoni*, 96 F. 3d 1132, 1150 (CA9 1996) (en banc) (Kozinski, J., dissenting).

Purkett simply reaffirms the importance of the trial court in resolving *Batson* claims. Since a bare record cannot convey the tone of voice, body language, or other nuances that will inform the trial court's decision, *Batson* claims are reviewed with "great deference" on appeal. *Batson*, 476 U. S., at 98, n. 21. The Court of Appeals in *Purkett* had held that the trial court must find that the explanation for the peremptories is plausible before a trial court can deny a *Batson* motion. See 514 U. S., at 767-768. This effectively combined *Batson*'s second and third steps. See *id.*, at 768. This holding undercut the deference accorded the trial court's findings under *Batson*. See *id.*, at 769.

Purkett does not substantially diminish *Batson*'s reach over peremptory challenges. While it is proper to leave most of the *Batson* inquiry to the trial court, this creates the potential for great variation in *Batson*'s enforcement. See Pizzi, *Batson* v. *Kentucky*: Curing the Disease But Killing the Patient, 1987 S. Ct. Rev. 97, 137. Since granting a *Batson* motion is even less likely to be reversed on appeal than a denial,[3] trial courts retain considerable authority of peremptory challenges after *Purkett*. Even after *Purkett*, a litigant facing a *Batson* motion without an adequate justification for the contested peremptory challenge faces a genuine risk of losing the right to that peremptory challenge.

The threat of a *Batson* motion inevitably colors the jury selection process. This is mostly worthwhile, since racial and sexual discrimination has no legitimate place in jury selection. By giving litigants incentives to avoid jury discrimination, *Batson* appropriately serves society and the equal protection interests embodied in the Fourteenth Amendment. Counsel are aware of *Batson*'s importance, and it is a major consideration in jury selection. "*Batson* challenges have become commonplace in our courtrooms; rare is the trial where one side or the other does not rattle a *Batson* sabre." *Annigoni*, 96 F. 3d, at 1150 (Kozinski, J., dissenting). While it is good for courts and counsel to pay heed to *Batson*'s prohibition against jury discrimination, overzealous application of the decision needlessly diminishes peremptory challenges.

A significant risk of *Batson* is the elimination of challenges based on more ephemeral justifications such as hunches or a dislike of a particular venire member. Raising a *Batson* claim against a challenge based on a hunch creates significant problems for the justice system. The counsel that made the

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3. For example, double jeopardy would prevent the prosecution's appeal of a successful *Batson* motion after a verdict and judgment have been rendered in a criminal case, see *supra* note 2, while an interlocutory appeal in the middle of jury selection is impractical.

challenge is placed in the unenviable position of articulating reasons for a type of decision that by definition is not capable of justification through formal reasoning. Valid, nondiscriminatory "neutral" reasons may not be able to be articulated even though they exist.

> "In the world of peremptory challenges, where it is acceptable to challenge jurors based on hunches, body language, pop psychology, political preferences, and economic status, and where lawyers are encouraged to strike jurors on the basis of the subjective feelings and impulses, there is no content to the notion of a 'neutral explanation.'" Pizzi, 1987 S. Ct. Rev., at 135 (footnote omitted).

This leads to several uniformly difficult alternatives. If counsel truthfully says that the peremptory challenge is based on a hunch, then the burden shifts to the trial court. Accepting this explanation at face value threatens to erode the *Batson* standard in a sea of pat explanations. Uniform rejection of hunches would eliminate a valid and useful form of peremptory challenge. Cf. *J. E. B.*, 511 U. S., at 147-148 (O'Connor, J., concurring) (legitimacy of hunches in peremptory challenges). The trial court's only alternative is to attempt to use its own judgment to discern whether the claim of a hunch is valid or a pretext for discrimination. While *Batson* contemplates trial courts using their judgment and analysis of credibility, see 476 U. S., at 98, n. 21, even the most experienced trial court judge may have difficulty with this decision.

Batson's risk is that the search for objective, neutral criteria that can be explained to trial and appellate courts distorts jury selection. Being accused of intentional discrimination is at best difficult. The *Batson* inquiry "requires that [counsel] reveal and explain his motivations in court, on the record, and in the presence of [opposing] counsel . . . ," Reiss, Prosecutorial Intent in Constitutional Criminal Procedure, 135 U. Pa. L. Rev. 1365, 1419 (1987), making this issue even more difficult for the accused attorney. Excessive enforcement under *Batson* will

deter peremptory challenges made for nondiscriminatory reasons but which counsel fears to defend in open court.

This problem is magnified by the consequences of an adverse *Batson* ruling. In addition to losing the challenge, and being left with a juror that counsel has tried to remove, the attorney is also labeled as racist or sexist. Excluding someone from jury service on racial grounds is a federal crime. See 18 U. S. C. § 243. While prosecution is highly unlikely, being found racist or sexist in court is a profound deterrent, and a serious matter. It is important to keep *Batson* claims from being made lightly in order to prevent any further erosion of the peremptory challenge.

Batson's regulation of peremptory challenges is so powerful that it is now used by some litigants for reasons other than preventing discrimination. "Some prosecutors also commented that defense counsel sometimes use the [*Batson*] motions strategically, to embarrass the prosecutor or to prevent the loss of a juror biased in the defendant's favor." Montoya, The Future of the Post-*Batson* Peremptory Challenge: Voir Dire by Questionnaire and the "Blind" Peremptory, 29 U. Mich. J. L. Reform 981, 1008 (1996). Peremptory challenges are too important to justice and society to sacrifice to this use of *Batson*. *Batson*'s goal of preventing jury discrimination is important, but its procedure should not be manipulated to where its marginal cost in harm to peremptory challenges outweighs the marginal benefit of preventing discrimination. California's rule appropriately reflects this calculation.

IV. The California rule sets an appropriate balance between *Batson*'s costs and benefits.

California requires that the moving party under *Batson* v. *Kentucky*, 476 U. S. 79 (1986) make its prima facie case by proving discrimination by a preponderance of the evidence. See *People* v. *Johnson*, 30 Cal. 4th 1302, 1306, 71 P. 3d 270, 272 (2003). This reflects an appropriate balance of the social

costs and benefits of regulating peremptory challenges through the Equal Protection Clause. Requiring this level of proof helps to preserve peremptory challenges by preventing needless examination of counsel's motives for making challenges, while avoiding the insurmountable burden of proof of *Swain* v. *Alabama*, 380 U. S. 202 (1965). In addition, this approach is the most natural reading of the language of *Batson* and this Court's interpretations of that case.

California's approach to *Batson* deals with the most significant difficulty with that decision. *Batson*'s problem is that it requires courts to inquire into an attorney's motives. This subjective inquiry is foreign to most constitutional criminal procedure. Objectivity is the general rule, such as with justification for a search or seizure, see *Whren* v. *United States*, 517 U. S. 806, 814 (1996); or whether a suspect is in custody for the purpose of *Miranda* v. *Arizona*, 384 U. S. 436 (1966). See *Berkemer* v. *McCarty*, 468 U. S. 420, 442, and n. 35 (1984). *Batson* procedure "places a spotlight on [counsel's] motives in the most immediate, dramatic, and intrusive fashion." Reiss, Prosecutorial Intent in Constitutional Criminal Procedure, 135 U. Pa. L. Rev. 1365, 1419 (1987). This inquiry is also alien to the entire idea behind peremptory challenges—that they need no justification. See *supra*, at 20-21. Unfortunately, there is no alternative to this subjective inquiry. Refusing to examine counsel's subjective intent would render *Batson* a nullity, and return to the unenforceable standard of *Swain* v. *Alabama*, 380 U. S. 202 (1965).

Batson's first stage, the prima facie case, is the logical place to weed out unnecessary claims. Since the greatest cost of *Batson* is requiring counsel to go through the unfortunate process of justifying his or her peremptory challenges, it is sensible to proceed to *Batson*'s second step only when it is necessary. If the proponent of a *Batson* motion cannot raise an inference of discrimination by a preponderance of the evidence, then counsel should not be forced to undergo the humiliation of standing accused of being a racist, nor the difficulty of

explaining the inherently difficult to explain peremptory challenge.

In addition to being fair to the party making the peremptory challenge, this standard helps to limit the strategic use of peremptory challenges. As noted earlier, there are reports that parties do not use *Batson* just to combat perceived discrimination. Now *Batson* is also a tool to humiliate opposing counsel, or to keep one's opponent from using a peremptory challenge against a juror biased in one's favor. See *supra*, at 25. Statements that *Batson* challenges are now "commonplace," see *United States* v. *Annigoni*, 96 F. 3d 1132, 1150 (CA9 1996) (en banc) (Kozinski, J., dissenting), are consistent with the idea that *Batson* challenges are now made freely in order to gain an advantage against the opponent. The only way to prevent abuse of *Batson* is by setting a sufficiently high barrier to *Batson* challenges. This can only be done at the first stage. If standard for a prima facie case is lowered from California's, then abuse of *Batson* will only increase.

California's approach is also consistent with the most natural reading of *Batson* and cases interpreting its rule. If the trial court finds a prima facie case, then the opposing party must "articulate a neutral explanation related to the particular case to be tried." Saying nothing, or simply issuing a blanket denial of discriminatory intent leads to the *Batson* motion succeeding. "Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive or 'affirm[ing] [his] good faith in making individual selections." *Batson*, 476 U. S., at 98. If counsel provides a neutral explanation, then the trial court "will have the duty to determine if the defendant has established purposeful discrimination." *Ibid.*

Requiring the *Batson* proponent to make his or her case at the first step is the only way to make sense of this procedure. Since the party defending the peremptory challenge will lose the motion if it does not provide a neutral explanation, it is only fair to make the party attacking the peremptory challenge to carry its entire burden at the first stage.

This reading is consistent with decisions describing *Batson* procedure. Language in the cases interpreting *Batson* affirm that the proponent of the *Batson* motion must make his or her entire case at the first stage of the three-step inquiry. See, *e.g.*, *Miller-El* v. *Cockrell*, 537 U. S. 322, 328-329 (2003).

This Court also affirmed that once a prima facie is made, then the party making the peremptory challenge is required to provide a neutral explanation at the second step or the *Batson* motion succeeds. See *Batson*, 476 U. S., at 98. This separates the *Batson* "trial" from a standard trial. While the defending party in a trial may present no evidence and still succeed if the jury finds that the prosecution or the plaintiff did not carry its burden of proof, in *Batson* the defense carries its own burden once the prima facie case is made by the proponent.

This reinforces the correctness of the California Supreme Court's conclusion that *Batson*'s prima facie case is the first of the two types of prima facie cases described in Wigmore. See *Johnson*, 30 Cal. 4th, at 1315, 71 P. 3d, at 278. Wigmore describes two uses of prima facie evidence. The first use discussed is where the term is "used as *equivalent to the notion of a presumption*, even in the strict sense." 9 Wigmore, Evidence § 2494, p. 379 (Chadbourn rev. 1981) (emphasis in original). This means that the proponent who had the burden of proving the issue

> "has not only removed by sufficient evidence the duty of producing evidence to get past the judge to the jury, but has gone further, and, either by means of a presumption or by a general mass of strong evidence, has entitled himself to a ruling that the opponent should fail if he does nothing more in the way of producing evidence." *Ibid.*

The second, very different use of prima facie "represent[s] the stage . . . where the proponent, having the first duty of producing some evidence in order to pass the judge to the jury, has fulfilled that duty, satisfied the judge, and may properly claim that the jury is allowed to consider this case." *Ibid.*

Batson's prima facie case is consistent with Wigmore's first definition. The shifting of the burden of production from the proponent to the opponent once the prima facie case is made describes *Batson*'s first and second stages. Since *Batson* has no presumption of discrimination, the prima facie case can only be made by Wigmore's "general mass of strong evidence." That describes the proof by a preponderance of the evidence found in the California standard.

The second use of prima facie case, although more common, deals with a different type of hearing than a *Batson* proceeding. A lower standard of evidence is acceptable in this second definition in order to preserve the jury's role as the ultimate factfinder. Requiring the proponent to satisfy the judge that it had fulfilled its entire burden of proof before the case could go to the jury usurps the jury's function. This consideration is inapplicable to *Batson* claims, because the trial court that decides whether there is a prima facie case is also the ultimate factfinder. Since there is no jury function to protect, it makes sense to require the *Batson* proponent to satisfy the burden of proving its case at the first stage.

Another aspect of the *Batson* inquiry confirms this interpretation. In *Hernandez* v. *New York*, 500 U. S. 352 (1991), the plurality noted, "In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed." *Id.*, at 365. The explanation of the peremptory challenge is the focus of the *Batson* inquiry because *Batson* begins by the proponent proving discrimination. If the proponent does not have to meet its ultimate burden at *Batson*'s first stage, then the focus on counsel's explanation for the peremptory challenge takes a very different tone. Inferences drawn from counsel's explanation at *Batson*'s second stage will supplement the prima facie case to provide proof of discrimination by a preponderance of the evidence, completing the proponent's case. *Batson*'s requirement that counsel must explain a peremptory challenge is already onerous. Using that compelled explanation

as evidence against the party making the peremptory challenge is unacceptable, particularly since *Batson* now covers civil litigants and criminal defendants.

"By preserving the peremptory challenge, and superimposing an antidiscrimination rule, the Court has struck a sensible and workable balance . . . . Because such a modified peremptory challenge serves important functions, it is worth preserving," Underwood, Ending Race Discrimination in Jury Selection: Whose Right is it Anyway?, 92 Colum. L. Rev. 725, 761 (1992). The interests served by *Batson* are not advanced by turning it into a fishing expedition for proof of discrimination or a means of preventing nondiscriminatory peremptory challenges based upon hunches or similarly unarticulable justifications. *Batson*'s first stage is the only realistic means for controlling this potentially intrusive inquiry. Requiring the party attacking the peremptory challenge to make its case before requiring opposing counsel to explain the challenge preserves peremptory challenges without sacrificing equal protection. It is fair, efficient, and consistent with this Court's decisions. Neither society nor equal protection require anything more.

CONCLUSION

The decision of the California Supreme Court should be affirmed.

March, 2005

Respectfully submitted,

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(1)

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IN THE
Supreme Court of the United States

JAY SHAWN JOHNSON,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Writ Of Certiorari To The Supreme Court of California

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Introductory Statement

This case was initially heard in the October, 2003 Term. However, on May 3, 2004, this Court dismissed for want of jurisdiction inasmuch as the petitioner had raised additional, potentially dispositive state law claims that had been reached neither by the intermediate Court of Appeal nor by the California Supreme Court, whose judgment was the subject of the writ of *certiorari* that had issued. *Johnson v. California*, ___ U.S. ___, 124 S. Ct. 1833 (2004) (*per curiam*).

On remand following that dismissal, the California Court of Appeal rejected petitioner's state law arguments and the California Supreme Court denied discretionary review. Petitioner again asked this Court to review the California Supreme Court's "*Wheeler/Batson*" ruling, which had merged into the new, now-final state court judgment. This Court granted the writ. *Johnson v. California*, 73 U.S.L.W. 3396 (U.S. Jan. 7, 2005).

When the matter was heard in the last Term, present *amici* submitted a brief in support of Petitioner. In the intervening period, there have been no decisions of the California Supreme Court that materially affect the issues presented by that Court's 2003 decision in this case, *People v. Johnson*, 30 Cal. 4th 1302 (2003). Accordingly, *amici* reprint, in the following pages, the brief they previously submitted in the October, 2003 Term.

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Interest of *Amici*[*]

Amici are non-profit organizations that seek to protect and further constitutional and statutory rights, including in particular the right to be free from racial discrimination in any contacts with the criminal justice system. More detailed descriptions of the *amici* and their interest in this matter are contained *infra* at Appendix A.

Summary of Argument

This Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986) was intended to create a workable mechanism to prevent racial discrimination through peremptory strikes from infecting criminal trials. *Batson* replaced the "crippling burden of proof" necessary to show discrimination in the use of peremptory challenges that had been erected by the ruling in *Swain v. Alabama*, 380 U.S. 202 (1965), with the now-familiar three-part procedure: *First*, the defendant must establish a *prima facie* case by showing facts and circumstances that "raise an inference" of discrimination; *second*, once the *prima facie* case has been established, the prosecutor must offer a facially nondiscriminatory reason for the challenged strike; and *third*, after the prosecutor articulates such a reason, the defendant may offer additional evidence, either to demonstrate that the proffered justification is pretextual or to meet in any other way his burden of persuading the trier of fact that the strike was motivated by discriminatory purpose. The trial court determines whether discrimination occurred by considering all relevant evidence offered by any party at any stage.

This matter involves what showing must be made to establish a *prima facie* case — a subject that the Court has not

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[*] Letters of consent to the filing of this brief have been lodged with the Clerk of this Court. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici*, made any monetary contribution to its preparation.

revisited since *Batson*. Lower federal courts consistently interpret the *prima facie* burden to require that a defendant prove only facts that support an inference of discrimination.

Historically and in the decision below, however, the California Supreme Court has required a substantially greater evidentiary showing at the *prima facie* case stage. Both before and after *Batson*, that Court has held that proof sufficient for an inference of discrimination "is not conclusive," and no *prima facie* case exists unless the defendant proves more, *i.e.*, a "strong likelihood" of discrimination.

The Supreme Court of California sought to justify its *prima facie* case standard by misreading this Court's Title VII cases. But Title VII, like *Batson*, imposes only a "minimal" burden on plaintiffs at the *prima facie* stage. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993).

The higher standard for the *prima facie* case that was applied by the courts below is contrary to *Batson* and inadequate to protect defendants' Fourteenth Amendment rights, as the facts of this case demonstrate. Petitioner clearly presented sufficient proof to support an inference that the prosecution's strikes were discriminatory: Petitioner is an African American; the prosecutor used peremptory challenges to remove *all* African Americans from the jury; a disproportionate number of the prosecutor's peremptory challenges were lodged against African-American venirepersons; the prosecution asked no questions of the African Americans on the venire before seeking to strike them; and the circumstances of the offense had racial overtones (the victim was the child of Petitioner's white girlfriend).

This Court should disapprove the standard enunciated by the Court below because, as detailed herein, it impedes the discovery and eradication of racial discrimination that was the purpose of *Batson*.

ARGUMENT

The California Supreme Court's Decision and the Procedure that Court has Established for Trial Court Consideration of Objections to Peremptory Challenges as Discriminatory Departs from this Court's Ruling in *Batson* and is Inadequate to Safeguard the Constitutional Rights *Batson* was Intended to Protect

A. The *Batson*[1] Decision

1. *Strauder* and *Swain*: The Onerous Burden of Proof

Although this Court announced nearly 125 years ago that excluding individuals of a criminal defendant's race from serving on his jury violates his right to equal protection under the Fourteenth Amendment, *Strauder v. West Virginia*, 100 U.S. 303 (1879), the exclusion of African-American prospective jurors remained a notorious feature of criminal trials throughout most of the 20th Century. This was in part because *Strauder*'s general rule lacked any specific mechanism for enforcement at trial until 1965, when the Court decided *Swain v. Alabama*, 380 U.S. 202 (1965).

This Court's decision in *Swain* offered the first guidance to lower courts seeking to determine whether the use of peremptory challenges for the purposeful exclusion of African Americans violated the Fourteenth Amendment. But *Swain*'s requirement of systemic proof created a virtually insuperable barrier for defendants alleging discrimination in the prosecutor's use of peremptory challenges and failed to ameliorate the very problem it was meant to solve. *Swain* demanded that the defendant show that the prosecution, "whatever the circumstances, whatever the crime and whoever the defendant or victim may be, is responsible for the removal of Negroes . . . with the result that no Negroes ever serve on

[1] *Batson v. Kentucky*, 476 U.S. 79 (1986).

petit juries . . . ." *Swain*, 380 U.S. at 223. As the Court later put it, the "crippling burden of proof"[2] established in *Swain* represented a stumbling block in this Court's "unceasing efforts to eradicate racial discrimination."[3]

Twenty years after *Swain* was decided, racial discrimination in jury selection remained a fixture in many American courtrooms.[4] In fact, in the two decades immediately following *Swain*, not a single federal court made a finding that any peremptory challenges had been exercised in a discriminatory manner.[5] The reality, of course, was that African Americans were virtually openly excluded from participation in a system of justice purporting to promise equality and fairness. The gulf between constitutional promise and everyday practice bred cynicism and distrust in the criminal justice system.

Against this backdrop, the Court abandoned *Swain* in *Batson*, largely because it concluded that the formidable *Swain*

[2] *Batson*, 476 U.S. at 92.

[3] *Id.* at 85.

[4] This was documented in several successful *Swain* challenges in the late 1980's and the 1990's. *See, e.g., Horton v. Zant*, 941 F.2d 1449, 1455-60 (11th Cir. 1991) (*Swain* test satisfied where evidence showed prosecution struck 90% of African-American jurors in capital cases over a seven-year period, in addition to other evidence showing prosecutor took steps to lessen minority participation in jury system); *Miller v. Lockhart*, 65 F.3d 676, 680-82 (8th Cir. 1995) (*Swain* test satisfied where prosecutor used ten strikes against African-American jurors in instant case and other evidence showed African Americans excluded peremptorily in large numbers in five-year period preceding Miller's trial); *Jones v. Davis*, 835 F.2d 835 (11th Cir. 1988) (testimony of six practicing attorneys showed black jurors routinely struck by prosecutors in jurisdiction; *Swain* standard satisfied).

[5] *See* JEFFREY ABRAHAMSON, WE THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 134 (1994).

standard was insulating discriminatory conduct from judicial remedy.[6] The *Batson* Court recognized that the exclusion of even a single African American from a jury because of race violated the Fourteenth Amendment. It established a framework intended to lower *Swain*'s virtually insurmountable proof requirements to make it possible to demonstrate that discrimination had occurred in a single trial, or with respect to a single peremptory strike.[7] This reform of the *Swain* standard was intended by the Court also to restore public faith in the criminal justice system among criminal defendants, prospective jurors, and the public generally.[8]

[6] Indeed, *Swain*'s author, Justice White, wrote in his concurring opinion in *Batson*: "It appears, however, that the practice of peremptorily eliminating blacks from petit juries in cases with black defendants remains widespread, so much so that I agree that an opportunity to inquire should be afforded when this occurs." 476 U.S. at 101.

[7] "The standard we adopt under the Federal Constitution is designed to ensure that a State does not use peremptory challenges to strike *any* black juror because of his race." *Batson*, 476 U.S. at 99 n.22 (emphasis added).

[8] "'The jury system postulates a conscious duty of participation in the machinery of justice. . . . One of its greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse.'" *Powers v. Ohio*, 499 U.S. 400, 406 (1991) (quoting *Balzac v. Porto Rico*, 258 U.S. 298, 310 (1922)). "Discrimination in the jury selection process undermines the justice system, and, thereby, the whole of our society." *Ramseur v. Beyer*, 983 F.2d 1215, 1225 (3d Cir. 1992); *see Batson*, 476 U.S. at 86 ("The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge . . . Those on the venire must be 'indifferently chosen' to secure the defendant's right under the Fourteenth Amendment . . . .") (citation omitted); *id.* at 87 (prospective juror stricken because of race suffers unconstitutional discrimination).

2. The *Batson* Holding

In *Batson*, this Court set forth the now-familiar three-part procedure for establishing discriminatory use of peremptory challenges that has been applied in thousands of criminal cases:

> At the first stage, the defendant must establish a *prima facie* case by showing that: (a) he is a member of a cognizable racial group, (b) the prosecution has exercised peremptory challenges to strike veniremembers of the defendant's race from the jury, and (c) "these facts and any other relevant circumstances *raise an inference* that the prosecutor used [peremptory strikes] to exclude the veniremen from the petit jury on account of their race." *Batson*, 476 U.S. at 96 (emphasis added).[9]

As the *Batson* Court recognized, one relevant circumstance is that peremptory challenges "permit[] 'those to discriminate who are of a mind to discriminate.'" *Batson*, 476 U.S at 96 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)).[10] This Court also offered a non-exhaustive list of other potentially pertinent circumstances, including a pattern of strikes against jurors of a cognizable group, and questions and statements during *voir dire* by the proponent of the peremptory challenge. *Id.* at 97.

At the second stage, the burden shifts to the prosecution to offer a race-neutral reason for its contested strikes. *Id.* The

[9] *Cf. Powers v. Ohio*, 499 U.S. at 402, 415 (extending *Batson* to permit defendant to challenge discriminatory use of peremptory strikes against venire members not of the defendant's own race).

[10] The Court in *Batson* relied upon long-settled principles developed in cases involving constitutional challenges to the composition of jury *venires* in fashioning the *prima facie* case standard that it enunciated for challenges to the use of peremptory strikes: the "combination of factors in the empaneling of the petit jury, *as in the selection of the venire*, raises the necessary inference of purposeful discrimination." 476 U.S. at 96 (emphasis added).

proponent of the strike may not rely on the "assumption — or [an] intuitive judgment — that the [excluded venire members] would be partial to the defendant because of their shared race." *Id.* Neither may the proponent rebut a *prima facie* case by simply denying a discriminatory motive or "affirming [its] good faith in making individual selections." *Id.* at 98 (citations omitted). Rather, the strike's proponent must articulate a race-neutral reason related to the particular case being tried. *Id.*

However, under *Batson*, the proponent's explanation "need not rise to the level justifying exercise of a challenge for cause." *Id.* at 97. In *Purkett v. Elem*, 514 U.S. 765 (1995), the Court further explained that the facially valid reason for striking a prospective juror offered by the strike's proponent at the second stage of the *Batson* procedure need not be "persuasive, or even plausible" because a "'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection." *Id.* at 768-69. *See also Hernandez v. New York*, 500 U.S. 352 (1991).

Purkett significantly lowered the bar for parties seeking to rebut a *prima facie* case: any reason not facially race-based is acceptable at this stage. This lowering of the bar practically insures that courts will reach the third stage of *Batson* and thus helps explain why most rulings on the existence of discrimination in peremptory strikes are made at the third stage.

At the third stage, *Batson* requires courts to decide whether the defendant has indeed established that the prosecution purposely used its peremptory strikes in a racially discriminatory manner. *Batson*, 476 U.S. at 98. At this stage, the court is to consider all the evidence before it, including the evidence offered to make out the *prima facie* case and the proffered race-neutral reason for the strikes, as well as any additional relevant circumstances, and determine whether the prosecution's reasons are valid or whether they are merely pretext for racial discrimination. *See Purkett*, 514 U.S. at 768.

3. The Federal Courts Consistently Interpret *Batson* as Requiring, at Stage 1, no more than a Showing of Facts from which a Court might Infer Discriminatory Use of Peremptory Challenges by the Prosecutor in order to Trigger the Prosecutor's Obligation to Give Reasons for Strikes

The State of California supported a grant of review in this case because the Ninth Circuit, which hears appeals from California federal District Court *habeas corpus* decisions, has rejected the California Supreme Court's requirements for establishing a *prima facie* case at Stage 1 of the *Batson* procedure. The Ninth Circuit holds that the state court's formulation does not afford criminal defendants the protection to which they are entitled under the Fourteenth Amendment. See *infra* pp. 14-15 & n.23 (discussing *Wade v. Terhune*, 202 F.3d 1190 (9th Cir. 2000), and similar cases). The Ninth Circuit does not stand alone in its view of the *prima facie* case burden. Rather, the California Supreme Court's interpretation of the *prima facie* case under *Batson* is inconsistent with the understanding of each of the federal circuits to have addressed the issue.[11]

While the courts of appeals' precise implementation of the *prima facie* case has necessarily depended on the facts and circumstances of individual cases, none of the federal circuits has described the initial burden in a *Batson* challenge to be as onerous as the formulation of the California Supreme Court.

The Eleventh Circuit, like the Ninth Circuit, has expressly rejected the California view, holding that the "strong likelihood" formulation imposes a burden on the objecting party that is impermissibly "higher than *Batson*'s."[12] The

[11] The D.C. Circuit has not had occasion to address the quantum of proof necessary to establish a *prima facie* case under *Batson*.

[12] *King v. Moore*, 196 F.3d 1327, 1334 (11th Cir. 1999) (rejecting a pre-*Batson* state standard for a *prima facie* showing that

Eleventh Circuit has held that a trial court should proceed to the second stage of the three-part *Batson* procedure whenever it has a "reasonable suspicion" of discrimination.[13]

The other courts of appeals have adopted similar formulations of the modest requirements for a *prima facie* case under *Batson*. Thus, the First Circuit has stated that the *prima facie* burden is "not onerous," and that the objector need only show "circumstances sufficient . . . to raise an inference" of discrimination.[14] The Second Circuit has held that the objecting party has the "minimal burden" to show that the "circumstances surrounding the peremptory challenges raise an inference of discrimination."[15] The Third Circuit has said that the *prima facie* case requires "circumstantial evidence tending to support such an inference [of discrimination]" and reasoned that the "evidence . . . [need] not mandate a conclusion that discrimination occurred, but . . . [need only provide] sufficient reason to believe that discrimination may have been at work

required a "strong likelihood" of discrimination as "higher than *Batson*'s" but concluding that the defendant had failed to make out a *prima facie* showing under the proper *Batson* standard) (citing *Neil v. State*, 457 So. 2d 481, 486-87 (Fla. 1984)).

[13] *United States v. Allen-Brown*, 243 F.3d 1293, 1298 (11th Cir. 2001) ("The '*prima facie*' requirement of *Batson* is not simply a limit on the court's intrusion into counsel's thought processes; it also compels the trial court to act if it has a reasonable suspicion that Constitutional rights are being violated in its presence.").

[14] *United States v. Escobar-de Jesus*, 187 F.3d 148, 164-65 (1st Cir. 1999) (quoting *United States v. Bergodere*, 40 F.3d 512, 516 (1st Cir. 1994)).

[15] *Overton v. Newton*, 295 F.3d 270, 277, 279 n.10 (2d Cir. 2002); *see also Barnes v. Anderson*, 202 F.3d 150, 155-56 (2d Cir. 1999) (stating that the first step of a *Batson* inquiry "*merely* requires the movant to 'show that the circumstances raise an inference of racial discrimination'" (quoting *United States v. Diaz*, 176 F.3d 52, 76 (2d Cir. 1999) (emphasis added)).

here to require the state to come forward with an explanation of its actions."[16]

The Fourth Circuit, while not directly deciding the question because the *Batson* claim was rejected by the trial court at the third stage of the process, described the defendant's burden at the first stage as being "to raise at least an inference that the Government used its strikes to exclude potential jurors based on their race."[17] Similarly, the Fifth Circuit has held that "a party is required to show that the circumstances surrounding the peremptory challenges raise an inference of purposeful discrimination."[18]

The Seventh Circuit has explained that "To establish a *prima facie* case for purposeful discrimination under *Batson*, [the defendant] must . . . point to facts and circumstances raising an inference that the potential jurors were excluded because of race."[19] The Eighth Circuit most recently phrased the standard as requiring a "showing [of] circumstances that

[16] *Johnson v. Love*, 40 F.3d 658, 665-66 (3d Cir. 1994) (alternative holding).

[17] *United States v. Grimmond*, 137 F.3d 823, 834 (4th Cir. 1998).

[18] *Brown v. Kinney Shoe Corp.*, 237 F.3d 556, 561 (5th Cir. 2001). In that case, the Fifth Circuit refused to disturb the trial court's rejection of the *Batson* objection at the *prima facie* stage where the objector presented no more than the "scant facts" that four white jurors had been stricken peremptorily, even though the Court of Appeals identified other circumstances that could have been presented to the trial court that "might have made a more convincing showing," *id.* at 562-63.

[19] *United States v. Cooper*, 19 F.3d 1154, 1159 (7th Cir. 1994). *See also Mahaffey v. Page*, 162 F.3d 481, 484 (7th Cir. 1998) ("*Batson* requires us to look to all the relevant facts and circumstances in assessing whether an inference of discrimination should arise.").

give rise to a reasonable inference of racial discrimination."[20]

The Sixth and Tenth Circuits have applied the *Batson* "inference" standard in a manner obviously contrary to the approach of the court below by finding a *prima facie* case to be established in circumstances where the only member of a particular group in the venire was struck.[21]

[20] *United States v. Wolk*, 337 F.3d 997, 1007 (8th Cir. 2003) (quoting *Simmons v. Luebbers*, 299 F.3d 929, 941 (8th Cir. 2002) (no error in trial court ruling that evidence limited to single fact that three blacks were struck from jury did not amount to *prima facie* showing), *cert. denied sub nom. Roper v. Simmons*, 123 S. Ct. 1582 (2003).

[21] *United States v. Mahan*, 190 F.3d 416, 424-25 (6th Cir. 1999) (holding that the government had "more than sufficient[ly]" established a *prima facie* case where a white defendant charged with a hate crime had struck the only potential black juror, explaining that "[t]here is simply no requirement that the government establish the existence of a pattern of discrimination"); *Heno v. Sprint/United Mgmt. Co.*, 208 F.3d 847, 854 (10th Cir. 2000) ("Ms. Heno met her *prima facie* case by showing that Sprint used a peremptory to strike the only black juror on the panel."); *United States v. Joe*, 8 F.3d 1488, 1499 (10th Cir. 1993) ("We conclude that the defendant established a *prima facie* case of purposeful discrimination because Joe is a member of a cognizable racial group, Native Americans, and the prosecutor's use of one peremptory challenge to strike Dawn Ferguson, the only Native American juror on the venire, raised an inference that Dawn Ferguson was excluded on account of her race.").

The Second, Third, Seventh and Eighth Circuits have found *prima facie* cases to be established where all or nearly all members of a particular group in the venire were struck. *See Tankleff v. Senkowski*, 135 F.3d 235, 249 (2d Cir. 1998) ("the fact that the government tried to strike the only three blacks who were on the panel constitutes a sufficiently dramatic pattern of actions to make out a *prima facie* case"); *Jones v. Ryan*, 987 F.2d 960, 971 (3d Cir. 1993) (*prima facie* case established where prosecutor exercised three

B. The California Supreme Court Ruling Departs from *Batson* and Rests on Flawed Interpretations of this Court's Jurisprudence

1. The California Court's Tortured Reading of *Wheeler* and *Batson* Produces a Standard Closer to *Swain*'s than *Batson*'s

The California Supreme Court's application of *Batson* and *People v. Wheeler*, 22 Cal. 3d 258 (1979), in the ruling below more closely approaches the discarded *Swain* burden of proof than it does the *Batson* standard for establishing a *prima facie* case. The decision below rests on the premise that "reasonable inference" and "strong likelihood" (both phrases were used in *Wheeler*), are synonymous with each other and with the "inference" standard articulated in *Batson*. *See People v. Wheeler*, 22 Cal. 3d at 280-81; *People v. Johnson*, 30 Cal. 4th 1302, 1312, 1313, 1318 (2003) ("*Wheeler*'s standard for establishing a *prima facie* case . . . is, and always has been, compatible with *Batson*. It merely means that to state a *prima facie* case, the objector must show that it is *more likely than not*

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of four peremptory challenges to strike black jurors, allowing only one black on otherwise all-white jury); *United States v. Williams*, 272 F.3d 845, 862 (7th Cir. 2001) ("Because the government excluded all four African-American members of the jury pool, the district court did not err in requiring the government to state a race-neutral explanation for its exercise of peremptories for these jurors."); *United States v. Sowa*, 34 F.3d 447, 452 (7th Cir. 1994) ("The government easily made its *prima facie* case that the peremptory challenges were motivated by race; each and every black venireperson was challenged."), *cert. denied*, 513 U.S. 1117 (1995); *United States v. Johnson*, 873 F.2d 1137, 1140 (8th Cir. 1989) (*prima facie* case established where, although two African-American venire members were seated on the jury, "the Government struck black veniremen at a disproportionate rate and struck blacks who did not respond during voir dire but did not strike whites who similarly did not respond.").

the other party's peremptory challenges [were racially discriminatory.]") (emphasis added). The California Supreme Court's attempt to equate *Batson*'s "inference of discrimination" with a showing that "it is more likely than not" that discrimination occurred simply cannot be squared with the well-established meaning of the words that it is using.

In California evidentiary law, an "inference" is "a deduction of a fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action." (CAL. EVID. CODE § 600; *see also* BLACK'S LAW DICTIONARY 778 (6th ed. 1990) (defining inference as "[a] logical and reasonable conclusion of a fact not presented by direct evidence but which, by process of logic and reason, a trier of fact may conclude exists from the established facts")). There is no suggestion in the statute or the definition that any specific quantum of evidence is required to trigger the logical deduction. "Strong likelihood," on the other hand, though not defined by statute, is a standard that California appellate courts have recognized is not easy to meet. *See, e.g.*, *People v. Buckley*, 53 Cal. App. 4th 658, 663 n.17 (Ct. App. 1997) (noting that "the 'strong likelihood' phrase has been repeated often by the [California] Supreme Court" and that "*the phrase conveys the clear message that the test is not an easy one* (a message we take to heart in the present case)" [in which the majority affirmed the trial court's refusal to find that the defendant had made out a *prima facie* case of discriminatory peremptory challenges]) (emphasis added).

Yet, in the present case, the California Supreme Court equates "inference" with "strong likelihood" in a clearly incorrect reading of *Batson*: "*Batson* permits a court to require the objector to present, not merely 'some evidence' permitting the inference, but 'strong evidence' that makes discriminatory intent more likely than not if the challenges are not explained." *Johnson*, 30 Cal. 4th at 1315, 1316. This interpretation simply

flies in the face of *Batson*. No federal court interpreting *Batson* has ever asserted that the opponent of the peremptory strike must do anything more than establish an "inference of discrimination" at the *prima facie* stage.[22] As one federal court explained, *Batson*'s requirement that the opponent show an "inference of discrimination" means just that and nothing more:

> It is sufficient to recognize that the clearly established governing legal rule pertaining to the *prima facie* burden announced in *Batson* is simply to be taken at face value: an inference of racial discrimination satisfies a prima facie case. Although inferences of racial discrimination defy standardization or quantification, as implicitly recognized by *Batson*, they are nonetheless self-evident and the subject of good common sense. *See Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (1978) (commenting in the context of a Title VII action that inferences of racial discrimination are to be drawn in "light of common experience"); *see also* 4 Leonard B. Sand, et al., Modern Federal Jury Instructions ¶ 75.01 (1998) (jurors are charged that "[i]n drawing inferences, [they] should exercise [their] common sense" and "are permitted to draw . . . such reasonable inferences as would be justified in light of their experience").

Overton v. Newton, 146 F. Supp. 2d 267, 278 (E.D.N.Y. 2001), *rev'd on other grounds*, 295 F.3d 270 (2d Cir. 2002).

Two Courts of Appeals — the Ninth and Eleventh Circuits — have expressly rejected the "strong likelihood" standard on the ground that it imposes a higher burden than *Batson*'s "inference" requirement. In *Wade v. Terhune*, the Ninth Circuit held that the "strong likelihood" standard, as interpreted by California courts following *People v. Bernard*, 27 Cal. App.

[22] *See supra* § A.3. Moreover, this interpretation of the "inference" standard goes against well-settled Title VII law, as discussed *infra*, in § B.3.

4th 458 (Ct. App. 1994), "does not satisfy the constitutional requirement laid down in *Batson*" and applies "a lower standard of scrutiny to peremptory strikes than the federal Constitution permits." 202 F. 3d at 1192.[23] In *King v. Moore*, 196 F.3d 1327, 1334 (11th Cir. 1999), the Eleventh Circuit rejected the standard applied by the trial court, which had found no *prima facie* showing of discrimination in the exercise of peremptory challenges by applying the test in *Neil v. State*, 457 So. 2d 481 (Fla. 1984), a decision that, like *Wheeler*, required a showing of a "strong likelihood" of discrimination at the *prima facie* stage.[24] (The Eleventh Circuit ultimately ruled in

[23] *Accord, e.g., Cooperwood v. Cambra*, 245 F.3d 1042, 1046-47 (9th Cir. 2001); *Birdine v. Hubbard*, No. C-99-037-MJJ, 2000 WL 1229112 at *4 n.2 (N.D. Cal. Aug. 21, 2000) ("[T]he 'strong likelihood' standard is not the correct standard for discriminatory jury challenges; rather, defendants need only raise an inference of discrimination") (following *Wade*).

[24] In *King*, the Eleventh Circuit reasoned that "*Neil*'s standard for a prima facie case . . . is higher than *Batson*'s: *Neil* requires the party opposing a strike to point to facts establishing a 'strong likelihood' that the strike had racial motives[, while] *Batson*, on the other hand, requires the party merely to raise an inference of improper motive." *Id.* at 1334. On the basis of this reasoning, the Eleventh Circuit re-examined the state court determination under "the more relaxed standard of *Batson*." *Id.*

After *Batson* was decided, the Florida Supreme Court itself revisited the issue. Although the Court did not expressly overrule *Neil*, in *State v. Slappy*, 522 So. 2d 18, 20-21 (Fla. 1988), the Florida Supreme Court substantially relaxed its definition of the *prima facie* standard to bring it in line with *Batson*:

> Recognizing, as did *Batson*, that peremptory challenges permit "those to discriminate who are of a mind to discriminate," [*Batson*,] 476 U.S. at 96, 106 S. Ct. at 1723, we hold that any doubt as to whether the complaining party has met its initial burden should be resolved in that party's favor. If we are to err at all, it must be in the way least likely to allow discrimination.

King v. Moore that under the proper *Batson* standard, the defense had not established a *prima facie* case.)

The "strong likelihood" language of *Wheeler* caused confusion among intermediate appellate courts about the appropriate standard when prosecutors' use of peremptory strikes was challenged, both before and after *Batson*.[25] In *People v. Fuller*, 136 Cal. App. 3d 403 (Ct. App. 1982) the court recognized that *Wheeler* included both "inference" and "strong likelihood" language but held that a defendant need only show "a reasonable inference of group bias" to establish the *prima facie* case. *Id.* at 423. Twelve years later, post-*Batson*, another California appellate court reached the opposite conclusion from *Fuller*. *See People v. Bernard*, 27 Cal. App. 4th at 465 (rejecting "a reduction of the *prima facie* standard to a 'reasonable inference' test").

In a series of decisions spanning the decade preceding Mr. Johnson's trial, the California Supreme Court repeatedly applied the words "strong likelihood" as the standard for establishing a *prima facie* case, while omitting any reference to the "reasonable inference" standard.[26] Finally, after the Ninth

Slappy, 522 So. 2d at 22; *see also Bryant v. State*, 565 So. 2d 1298, 1300 (Fla. 1990).

[25]Unlike the Florida Supreme Court, *see supra* note 24, the California Supreme Court never abandoned the "strong likelihood" language after this Court's decision in *Batson*.

[26] *See, e.g., People v. Welch*, 20 Cal. 4th 701, 745 (1999); *People v. Williams*, 16 Cal. 4th 635, 663-64 (1997); *People v. Mayfield*, 14 Cal. 4th 668, 723 (1997); *People v. Arias*, 13 Cal. 4th 92, 134-35 (1996); *People v. Davenport*, 11 Cal. 4th 1171, 1199-1200 (1995); *People v. Crittenden*, 9 Cal. 4th 83, 115 (1994); *People v. Turner*, 8 Cal. 4th 137, 164-65 (1994); *People v. Garceau*, 6 Cal. 4th 140, 171 (1993); *People v. Montiel*, 5 Cal. 4th 877, 909 (1993); *People v. Howard*, 1 Cal. 4th 1132, 1153-54 (1992); *People v. Fuentes*, 54 Cal. 3d 707, 714 (1991); *People v. Bittaker*, 48 Cal. 3d 1046, 1092 (1989). To the extent that California courts perceived

Circuit's decision in *Wade v. Terhune*, the California Supreme Court again revisited the issue of the compatibility of the two standards articulated in *Wheeler*, and concluded that, contrary to the appellate court's holding in *Bernard*, "reasonable inference" and "strong likelihood" were synonymous. *See People v. Box*, 23 Cal. 4th 1153, 1188 n.7 (2000).

Until *Box*, no opinion of the California Supreme Court had clearly asserted that the two incongruent standards should be interpreted as synonyms. In this case, the very fact that the trial court applied only the "strong likelihood" standard to reject Mr. Johnson's *Wheeler* claim suggests that the trial court applied the higher of the two standards, at least as they were understood, pre-*Box*, to be distinct.

2. Experience under the California Rule Demonstrates the Gulf between the California Supreme Court Formulation and the Requirements for Showing a *Prima Facie* Case under *Batson*

The California courts' tortured interpretation of the *prima facie* standard of *Wheeler* has not only led to inconsistent applications of California cases. It has also produced results that are irreconcilable with *Batson*. In numerous pre-*Box* cases, both before and after *Bernard* was decided, the California Supreme Court applied a rule that evidence sufficient to "raise an inference" of discrimination was insufficient to establish a *prima facie* case. *See People v. Sanders*, 51 Cal. 3d 471, 500-01 (1990) (concluding that even though the prosecution's "removal of all members of a certain group may give rise to an inference of impropriety," the defendant still "failed to

the two standards as inconsistent after *Fuller* and *Bernard*, the repeated application of the "strong likelihood" standard, without reference to the "reasonable inference" language, acted as an endorsement of the former and reinforced the impression that a showing of a "reasonable inference" of discrimination was insufficient to establish a *prima facie* case under *Wheeler*.

demonstrate a strong likelihood" of discrimination and therefore no *prima facie* case had been established); *see also People v. Howard*, 1 Cal. 4th 1132, 1154, 1156 (1992) (trial court did not err in finding no *prima facie* case; defendant must show "from all the circumstances in the case . . . a *strong likelihood*" of discrimination, and "although the removal of all members of a certain group may give rise to an inference of impropriety, especially when the defendant belongs to the same group, the inference is not conclusive") (citing *Sanders*, 51 Cal. 3d at 500) (emphasis in original); *see also People v. Crittenden*, 9 Cal. 4th 83, 119 (1994) (citing *People v. Howard*, 1 Cal. 4th at 1156; *People v. Sanders*, 51 Cal. 3d at 500).

In short, in several cases prior to Mr. Johnson's trial in 1998, the California Supreme Court had indicated that a demonstration of an "inference of impropriety" was not "dispositive" of a *prima facie* case. This approach is patently inconsistent with *Batson*, which requires only that the opponent of the peremptory strike demonstrate that an "inference" of discrimination arises from a consideration of all of the relevant circumstances in order to shift the burden to the proponent to articulate a nondiscriminatory reason for the strike.

3. The California Supreme Court Misunderstood this Court's Reference to Title VII in *Batson* and Relied Upon a Wholly Mistaken Interpretation of Title VII's Requirements for Making Out a *Prima Facie* Case

The California Supreme Court interprets *Batson*'s discussion of a number of this Court's Title VII decisions, along with WIGMORE ON EVIDENCE, as authority for its conclusion that "*Batson* permits a court to require the objector to present, not merely 'some evidence' permitting the inference, but 'strong evidence' that makes discriminatory intent more likely than not if the challenges are not explained." *Johnson*, 30 Cal. 4th at 1316. Neither supports this conclusion.

This Court's Title VII jurisprudence is quite to the contrary. Nowhere in any of this Court's discussion of the standards for a *prima facie* case is there any endorsement of a "strong evidence" test. Rather, this Court's Title VII decisions universally recognize, like *Batson*, that what is required to make out a *prima facie* case is evidence showing circumstances that give rise to an inference of discrimination. *E.g.*, *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981) ("The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected *under circumstances which give rise to an inference of unlawful discrimination*.") (emphasis added).[27] The Court has described the necessary showing as "not onerous," *id.*, and as "minimal," *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993).

Nor do this Court's Title VII cases support the California Supreme Court's view that evidence sufficient to draw an inference of discrimination, as compared to that needed to create a presumption, is the "lower of the two burdens."[28]

[27] *See also* 1 BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 16 and n.46 (3d ed. 1976) ("The central inquiry in evaluating whether plaintiffs have met their initial burden is whether the circumstantial evidence presented is sufficient to create an inference (*i.e.*, a rebuttable presumption) that a basis for an employment-related decision was an illegal criterion.") [citing *Byrd v. Roadway Express*, 687 F.2d 85, 87 n.3 (5th Cir. 1982) (purpose of *prima facie* showing is to identify actions taken by employer from which discrimination can be inferred) and *Halsell v. Kimberly Clark Corp.*, 683 F.2d 285, 289 (8th Cir. 1982) (to establish prima facie case, plaintiff must produce evidence supporting inference of discrimination.)].

[28] In describing this Court's use of the term "*prima facie* case," the California Supreme Court interpreted *Burdine* as defining "*prima facie*" to require a greater evidentiary burden to shift the burden of production to defendant than is required for drawing an inference of discrimination. 30 Cal. 4th at 1315-16.

Neither *Burdine*, 450 U.S. at 254 n.7, (upon which the California Court specifically relies), nor any of this Court's other Title VII cases, requires a higher evidentiary burden for creation of a presumption than the quantum of evidence necessary to permit an inference of discrimination. Footnote 7 in *Burdine* is a description of the varying historical uses of the term "*prima facie* case" to refer to two different situations, one involving a presumption and one not. It is not an interpretation of Title VII law. Title VII creates no dichotomy between evidence sufficient to permit an inference of discrimination and evidence sufficient for a presumption. Rather, evidence sufficient to permit the drawing of an inference is all that is required for the creation of the presumption, and *Burdine*, 450 U.S. at 254 n.8, states expressly that "the word 'presumption' properly used refers only to a device for allocating the production burden" (citations omitted).[29]

The California Court uses the term "presumption" to indicate much more than a device to shift a production burden, but as a rule requiring that a *prima facie* case is established only through evidence that persuades the trier of fact on the ultimate issue of discrimination — a burden much higher than this Court's Title VII jurisprudence requires.[30]

Nor does the language cited from WIGMORE ON EVIDENCE

[29] As this Court noted in *Hicks*, "the McDonnell-Douglas presumption places upon the defendant the burden of producing an explanation to rebut the prima facie case. . . . In this regard, it operates like all presumptions, as described in Federal Rules of Evidence 301: 'In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.'" *Hicks*, 509 U.S. at 506-07.

[30] See *supra* pp. 18-20 & nn.27, 29.

support the California Supreme Court's "strong evidence" requirement. In the section of WIGMORE relied upon by the California Supreme Court (9 WIGMORE ON EVIDENCE, § 2494 (3d ed. 1940)), Wigmore simply notes that historically, one of the uses of the term "*prima facie*" has been to describe the situation where a party with the burden of proof, because of *either* a presumption or by a general mass of "strong evidence," is entitled to judgment if his opponent produces no evidence. Nowhere does Wigmore state that "strong evidence" is a prerequisite to the creation of the presumption. Nor does this Court, in its citation to WIGMORE in *Burdine*, impose such an evidentiary burden.

This Court's minimal burden for showing a prima facie case in Title VII cases is entirely appropriate in light of the realities of litigating claims of racial discrimination. As this Court noted in *United States Postal Serv. v. Aikens*, 460 U.S. 711, 715 (1983), the *McDonnell-Douglas* standard is a "sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination," [quoting *Furnco*, 438 U.S. at 577 (1978)] and only after the three-stage process outlined in *McDonnell-Douglas* does the trier of fact "ha[ve] before it all the evidence it needs to decide whether 'the defendant intentionally discriminated against the plaintiff'" [quoting *Burdine*, 450 U.S. at 253]. A higher burden at the first stage for establishing a *prima facie* case would effectively deny the trier of fact evidence that is critical to assess the issue of discrimination. See discussion *infra* § C.2.

C. The Approach of the California Supreme Court is Inadequate to Fulfill the Guarantees of the Fourteenth Amendment

1. Petitioner has Established a *Prima Facie* Case of Discrimination

In this case, Petitioner has clearly presented sufficient evidence from which to infer that the state's peremptory challenges, if unexplained, were based on race. The record demonstrates that after the challenges for cause, three African-American potential jurors — Clodette Turner, Sara Edwards and Ruby Lanere — remained available for service on Petitioner's jury. The state, however, used its peremptory challenges to exclude *all three* of these potential jurors. The circumstances surrounding the state's exercise of these peremptory challenges suggest that the strikes were racially motivated.

First, the state used its peremptory challenges to exclude *all* African-American potential jurors from service on Petitioner's jury. As this Court has noted, "[p]roof of systematic exclusion from the venire raises an inference of purposeful discrimination because the 'result bespeaks discrimination.'" *Batson*, 476 U.S. at 94-95 (quoting *Hernandez v. Texas*, 347 U.S. 475, 482 (1954)). Furthermore, in several federal Circuits, this fact *alone* is sufficient to establish a prima facie case of discrimination.[31]

[31] *See, e.g., Harris v. Kuhlmann*, 346 F.3d 330, 346 (2d Cir. 2003) (*prima facie* case of discrimination established "in highlighting a 100% pattern of the use of peremptory strikes against prospective black jurors"); *Mahaffey v. Page*, 162 F.3d at 484 (7th Cir. 1998) (pattern raising inference of discrimination "plainly is evident in the State's juror challenges here, where the prosecutor excused each and every African-American member of the jury venire"); *McCain v. Gramley*, 96 F.3d 288, 292 (7th Cir. 1996) (inference of discrimination may be drawn "where there are only a few members of a racial group on the venire panel and one party strikes each one of them"), *cert. denied*, 520 U.S. 1147 (1997); *United States v. Sowa*, 34 F.3d at 452 (in challenge to use of peremptory challenges by defense counsel, "[t]he government easily made its *prima facie* case that the peremptory challenges were motivated *by race;* each and every black venireperson was challenged").

Second, the prosecutor used a disproportionate number of his peremptory challenges to exclude African-American potential jurors. Specifically, the prosecutor used 25 percent of his challenges (3 of 12) to exclude African-American jurors even though such jurors represented less than 7.5 percent (3 of 40) of the qualified jurors passed for cause. This fact also suggests that the prosecutor's strikes were racially motivated. *See Hernandez v. New York*, 500 U.S. 352, 362 (1991).[32]

Third, although it had the opportunity to do so, the state elected not to ask questions of any of the African-American potential jurors before exercising its peremptory challenges. *See* JA at 20, 23-24, 31. This pattern of non-inquiry also supports an inference of discrimination, *see Batson*, 476 U.S. at 97, because it suggests an apparent lack of interest on the part of the prosecutor in any characteristic of the struck jurors other than their race. This failure was particularly significant in the case of Ms. Turner, who was excused without inquiry of any kind despite the fact that during *voir dire* by the trial court, she offered answers that indicated she might be inclined to favor the prosecution over the defense.[33]

[32] *See also Williams v. Woodford*, 306 F.3d 665, 682 (9th Cir. 2002), *amended opinion*, 384 F.3d 567, 584 (9th Cir. 2004) ("Statistical facts like a high proportion of African-Americans struck and a disproportionate rate of strikes against African- Americans can establish a pattern of exclusion on the basis of race that gives rise to a *prima facie Batson* violation."), *rehearing and rehearing en banc denied*, 2005 WL 237646 (9th Cir. Feb. 2, 2005).

[33] *See* JA at 19 (Ms. Turner had been the victim of a crime). The probative value of the failure to *voir dire* the African-American venirepersons is not neutralized by the prosecutor's failure to question non-minority individuals on the venire, *see Johnson*, 30 Cal. 4th at 1328; moreover, such an approach would create the tactical opportunity for a prosecutor intent on excluding African Americans from a jury to mask his motives by remaining silent during *voir dire*.

Finally, the offense at issue involved a black defendant and a victim who was the child of a white woman. The likelihood that peremptory challenges will be exercised in a racially discriminatory manner is significantly increased when the crime is of an interracial nature. This, too, is a circumstance recognized by the federal courts as supporting an inference of discrimination sufficient to establish a prima facie case under *Batson*.[34]

Together, these factors constitute ample evidence from which to infer that the state's peremptory challenges were based on race. Petitioner, therefore, more than adequately set forth a *prima facie* case of discrimination under *Batson*.

2. The California Supreme Court's *Prima Facie* Case Requirement Shields, Rather than Reveals and Corrects, Discriminatory Use of Peremptory Challenges by Prosecutors

Although it characterized many of the facts set forth in the

[34] *See, e.g., Mahaffey v. Page*, 162 F.3d at 484 ("And lest we forget, the crimes at issue in this case were obviously racially sensitive — Mahaffey, a young African-American male from Chicago's south side, was charged with murdering a white couple on the North side, and with attempting to murder their young son. This is therefore a case in which the racial composition of the jury could potentially be a factor in how the jury might respond to Mahaffey's defense at trial, as well as to his arguments in mitigation at the capital sentencing phase."); *Jones v. Ryan*, 987 F.2d 960, 971 (3d Cir. 1993) (taking into account that defendant was charged with a violent offense against a white victim in finding a *prima facie* case); *Williams v. Chrans*, 945 F.2d 926, 944 (7th Cir. 1991) ("In a case where the defendant is black and the victim is white, we recognize, at the prima facie stage of establishing a *Batson* claim, that there is a real possibility that the prosecution, in its efforts to procure a conviction, will use its challenges to secure as many white jurors as possible in order to enlist any racial fears or hatred those white jurors might possess."), *cert. denied*, 505 U.S. 1208 (1992).

preceding subsection as "highly relevant," *Johnson*, 30 Cal. 4th at 1326, "troubling," *id.*, and "warrant[ing of] careful scrutiny," *id.*, the California Supreme Court nonetheless concluded that Petitioner had failed to present sufficient evidence to establish a *prima facie* case of discrimination, *id.* at 1328. Thus, the trial prosecutor was never required to proffer race-neutral reasons for his peremptory challenges, Petitioner was never given the opportunity to demonstrate that such explanations were pretextual, and no court has had the opportunity to decide whether the strikes were actually discriminatory. By conflating the *prima facie* case with the ultimate burden of proof, the California standard substantially undermines what *Batson* was designed to achieve, an efficient and reliable system for determining whether peremptory challenges are tainted by racial discrimination. *See Hernandez v. New York*, 500 U.S. at 358-59. Instead of facilitating the discovery of unlawful racial discrimination, the California standard improperly leaves "prosecutors' peremptory challenges . . . largely immune from constitutional scrutiny." *Batson*, 476 U.S. at 92-93.[35] It does so in at least three ways:

First, the California rule places the defendant at a substantial evidentiary disadvantage. As this Court has made clear (and the reported cases outside of California confirm), the decision whether discrimination has occurred is normally made at the third stage of the *Batson* analysis, and not before.[36] It is at that stage that a court examines the totality of the

[35] Because California's interpretation of *Batson* places such a heavy burden on defendants at the first step of the inquiry, California prosecutors are less frequently required to justify their strikes, California defendants are less likely to secure judicial findings of discrimination, and California prosecutors who are "of a mind to discriminate," *Batson*, 476 U.S. at 80, are given greater incentive and opportunity to discriminate, increasing the odds that a criminal defendant may be tried by an unconstitutionally constituted jury.

[36] See *supra* pp. 6-7.

circumstances to determine the plausibility of whatever explanation has been offered for the disputed peremptory challenges. *Purkett v. Elem*. Under California's approach, by contrast, the defendant must *prove* discrimination before anyone knows the purported basis on which the peremptory challenges have been made. Instead of becoming a basis for further inquiry, the *prima facie* case serves both as the effective point of decision and as a barrier to further probative evidence on the question.

Even worse, the defendant is required not only to mount the initial hurdle of offering "strong evidence" of discrimination, but inquiry into the prosecutor's purported justification for a strike is further insulated from scrutiny by allowing the trial judge, as here, to *hypothesize* possible neutral explanations for the peremptory challenges and then to rely on those hypotheses in evaluating whether a *prima facie* case has been established.[37] This testing of the defendant's evidence against hypothetical bases for a strike makes clear that the determination of discrimination occurs before the prosecutor is required to reveal a basis for the challenge. It also imposes a much more demanding standard for a *prima facie* case than *Batson* requires for the Stage 3 determination whether discrimination occurred. Under *Batson*, the court must determine whether the evidence demonstrates that the reason for the strike was discrimination — not whether there is any theoretically neutral basis on which a challenge might have been made.[38] A record of proceedings to empanel a jury will

[37] In this case, the California Supreme Court relied on the fact that the the trial court hypothesized reasons why the trial prosecutor *might have* stricken the three African-American potential jurors, *see* 30 Cal. 4th at 1325-27, in upholding the *prima facie* case ruling: "if the record suggests grounds on which the prosecutor might reasonably have challenged the jurors, we affirm," *id.* at 1325.

[38] This Court has said that only the trial prosecutor's "legitimate reasons" for strikes are relevant to the *Batson* inquiry. *Batson*, 476

almost always contain hypothetical race-neutral reasons for peremptory challenges of African Americans, or members of any cognizable group. As this Court held in *Purkett*, such reasons need be only facially non-discriminatory, and virtually every single potential juror likely possesses some characteristic that could justify a peremptory challenge under this standard.[39]

U.S. at 98 n.20. The lower federal courts have held similarly. *See Mahaffey*, 162 F.3d at 483-84 n.1 (because apparent reasons do not reflect prosecutor's actual motivation they "cannot be mistaken for the actual reasons for a [peremptory challenge.]"); *Riley v. Taylor*, 277 F.3d 261, 282 (3d Cir. 2001) (*en banc*) ("Apparent or potential reasons do not shed any light on the prosecutor's intent or state of mind when making the peremptory challenge."); *Bui v. Haley*, 321 F.3d 1304, 1313-15 (11th Cir. 2003) (reasons offered by assistant prosecutor insufficient to rebut *prima facie* case because there was no evidence that lead prosecutor actually relied on them); *Turner v. Marshall*, 121 F.3d 1248, 1253 (9th Cir. 1997); *Hardcastle v. Horn*, No. 98-CV-3028, 2001 WL 722781 at *11 (E.D. Pa. June 27, 2001) ("While the apparent reasons gleaned from the record could have been the prosecutor's operative reasons that she might have offered in response to a *Batson* objection, no reviewing court could reasonably say that they probably were the prosecutor's reasons without engaging in sheer and unsupported speculation."), *vacated and remanded to permit State to introduce circumstantial evidence of reasons for strikes*, 368 F.3d 246 (3d Cir. 2004); *United States ex rel. Pruitt v. Page*, No. 97C-2115, 1999 WL 652035 at *7, (N.D. Ill. Aug. 20, 1999) ("To say that certain facts known about a juror *could* have supported a non-discriminatory challenge cannot establish that nondiscriminatory reasons existed.") (emphasis in original).

[39] Under *Purkett*, an enormous variety of traits or observations has been held sufficient to meet the prosecutor's burden of production at Stage 2 of a *Batson* inquiry. *See, e.g., U.S. v. Williams*, 264 F.3d 561, 571 (5th Cir. 2001) (prosecutor's statement that venireperson smiled at defendant satisfied Stage 2 of the *Batson* analysis); *U.S v. Mahan*, 190 F.3d at 425 (prosecutor's assertion that venireperson who was divorced or widowed might harbor hostility towards men was race-neutral reason sufficient to satisfy Stage 2).

Moreover, the fact that a trial judge can hypothesize a race-neutral explanation for a peremptory challenge says nothing about whether the *prosecutor* engaged in intentional discrimination. Under *Washington v. Davis*, 426 U.S. 229 (1976), which the Court repeatedly cited in *Batson*, it is the *prosecutor*'s subjective intent that is critical, not the trial judge's. Like *Swain*, the California rule thus significantly increases the likelihood that racial discrimination will go undiscovered, both because it impedes the development of a full trial record and because it asks the wrong question at the wrong stage of the proceeding.

Second, the absence of a full trial record has obvious consequences for appellate review. On the one hand, it makes appellate review more difficult. In *Miller-El v. Cockrell*, 537 U.S. 322 (2003), the Court engaged in a probing review of the prosecutor's stated reasons for his peremptory challenges, even in the context of a preliminary inquiry into whether the defendant was entitled to a certificate of appealability that would enable him to pursue his *Batson* claim in further habeas proceedings. When a court is actually reviewing a *Batson* claim on the merits, a fully developed record is more essential and its absence more severely compromises the appellate process.

The absence of a fully developed record also makes reversal more likely. In *Batson* and the cases that followed it, this Court has stressed that a trial court's findings on a *Batson* claim are entitled to deference. But that deference is based on the assumption that the trial court's critical findings "largely will turn on . . . credibility," *Batson*, 476 U.S. at 98 n.21, and that "evaluation of the prosecutor's state of mind based on demeanor and credibility lies peculiarly within a trial judge's province." *Hernandez*, 500 U.S. at 365 (internal quotations and citations omitted). Because the California courts have front-loaded so much of *Batson* into a threshold determination

regarding the *prima facie* case, it will often be the case (as here) that no judgment will have been made about the prosecutor's credibility. An appellate court's review will be more vigorous in such circumstances, with a diminished deference to the trier of fact's determinations that is likely to produce more frequent reversals.

Third, even reversal is much less likely to lead to a fair and just result if the prosecutor has not been required to provide a contemporaneous explanation for his peremptory challenges because of an inflated standard for assessing the defendant's *prima facie* case. Indeed, this Court identified precisely that problem in less extreme circumstances in *Miller-El*, 537 U.S. at 342-43:

> As we have noted, the trial court held its *Batson* hearing two years after the *voir dire*. While the prosecutors had proffered contemporaneous race-neutral justifications for many of their peremptory strikes, the state trial court had no occasion to judge the credibility of those explanations at that time because our equal protection jurisprudence then, dictated by *Swain*, did not require it. As a result, the evidence presented to the trial court at the *Batson* hearing was subject to the usual risks of imprecision and distortion from the passage of time.

In short, California's interpretation of *Batson* increases the chances of wrong results initially, increases the chances of appeal and reversal, and increases the chances that racial discrimination will never be uncovered because of delay. If *Batson* was designed to permit "prompt rulings on objections to peremptory challenges without substantial disruption of the jury selection process," *Hernandez*, 500 U.S. at 358, the approach adopted by the California courts is far more likely to achieve the opposite result.

CONCLUSION

For all of these reasons, the California Supreme Court's ruling in this case makes it harder to empanel a jury with the "'diffused impartiality,'" *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (quoting *Thiel v. S. Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)), necessary to protect a criminal defendant['s] "'life and liberty against race or color prejudice,'" *Strauder v. West Virginia*, 100 U.S. at 309; allows African-American jurors to be excluded because of their race in California criminal trials; thereby creates the improper impression that the State believes African Americans are unfit to serve on a petit jury, *Batson*, 476 U.S. at 87 (citing *Thiel*, 328 U.S. at 227 (Frankfurter, J., dissenting)); and "undermine[s] public confidence in the fairness of our system of justice," *Batson*, 476 U.S. at 87 (citing *Ballard v. United States*, 329 U.S. 187, 195 (1946) and *McCray v. New York*, 461 U.S. 961, 968 (1983) (Marshall, J., dissenting)). The judgment below should be reversed.

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APPENDIX A

Interest of *Amici Curiae*

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is a non-profit corporation formed to assist African-Americans in securing their rights by the prosecution of lawsuits. LDF has a long-standing concern with the influence of racial discrimination on the criminal justice system in general, and on jury selection in particular. LDF represented the defendants in, *inter alia*, *Swain v. Alabama*, 380 U.S. 202 (1965), *Alexander v. Louisiana*, 405 U.S. 625 (1972) and *Ham v. South Carolina*, 409 U.S. 524 (1973); pioneered in the affirmative use of civil actions to end jury discrimination, *Carter v. Jury Commission*, 396 U.S. 320 (1970), *Turner v. Fouche*, 396 U.S. 346 (1970); and appeared as *amicus curiae* in *Miller-El v. Cockrell*, 537 U.S. 322 (2003), *Batson v. Kentucky*, 476 U.S. 79 (1986), *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991), and *Georgia v. McCollum*, 505 U.S. 42 (1992).

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 400,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU of Northern California is one of its regional affiliates. Since its founding in 1920, the issue of race discrimination in jury selection has been a central concern of the ACLU. For that reason , the ACLU participated as *amicus curiae* in *Batson v. Kentucky*, and we have participated in most of this Court's cases interpreting its core holding.

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a nonprofit organization established in 1963, at the request of President Kennedy, to involve private attorneys in the effort to insure the civil rights of all Americans. Over the past 40 years, through its national office in Washington, D.C., and its eight independent local affiliate Lawyers' Committees, the organization has enlisted the services of thousands of members of the private bar in addressing the legal problems of racial minorities and the poor in voting, education, employment, housing, municipal services, the administration of justice and law enforcement. The Lawyers' Committee has long been concerned with the issue of race discrimination in jury selection, and participated as *amicus curiae* on this issue in both *Batson v. Kentucky*, 476 U.S. 79 (1986), and *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991).

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than 10,000 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense lawyers, public defenders and law professors. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner. Among NACDL's objectives is promotion of the proper administration of justice.